TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~486.~~ 247

WILLIAM STITT, PLAINTIFF IN ERROR,

vs.

ALFRED HUIDEKOPER AND FREDERICK W. HUIDEKOPER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED DECEMBER 6, 1871.

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a Among the rolls, records, and judicial proceedings of circuit court of the United States for the western district of Pennsylvania, may be found the following words and figures:

1 In the circuit court of the United States for the western district of Pennsylvania.

WILLIAM STITT, A CITIZEN OF THE STATE OF New Jersey, *vs.* ALFRED HUIDEKOPER AND FREDERICK W. Huidekoper, citizens of the State of Pennsylvania.	No. 41. May term. 1867. Case.

Issue summons, trespass on the case, against defendants, returnable to first Monday of June, A. D. 1867.

JAMES K. KERR,
Att'y for Pl'ff.

To HENRY SPROUL, Esq.,
Clerk C't C't, W. D. of Pennsylvania.

MAY 13TH, 1867.

STATE OF PENNSYLVANIA,
County of Crawford:

William Stitt, the above-named plaintiff, being duly sworn according to law, doth depose and say, that the defendants, Alfred Huidekoper and Frederick W. Hiudekoper are justly and legally indebted to
2 him, the said plaintiff, in the sum of thirty-three thousand three hundred and forty dollars; that said indebtedness accrued in the following manner: On or about the fifteenth day of November, A. D. eighteen hundred and sixty-four, (1864,) the defendants, Alfred Huidekoper and Frederick W. Huidekoper, made and entered into a verbal agreement with this affiant, whereby the said defendants did employ this affiant to sell certain tracts or parcels of land situate in Allegheny Township, county of Venango, and Commonwealth of Pennsylvania, containing about twelve hundred and eighty acres, for the price or sum of forty thousand dollars, or more; and that by the terms of said agreement, so made and entered into between the plaintiff and the defendants, this affiant was to receive from the defendants, for his services, on selling the said lands, situate as aforesaid, all sum or sums of money in excess of and over and above the sum of thirty-seven thousand five hundred dollars.

That, in pursuance of said verbal agreement so entered into as
3 aforesaid, this affiant did, on or about the tenth day of January, A. D. 1865, at the city of New York sell the said tracts or parcels of land for the price or sum of seventy thousand eight hundred and forty dollars, and duly notified the defendants of such sale and tendered to the said defendants the sum of thirty-seven thousand five hundred dollars as aforesaid, which was refused.

And this affiant doth further say, that the said defendants did refuse to convey the said lands, as they were in duty bound, under the terms and conditions of their said contract and agreement with this affiant, and in consequence of such refusal to convey the lands aforesaid this affiant is entitled to recover from the said defendants above-named the sum of thirty-three thousand three hundred and forty dollars for services so rendered by him to the defendants, in the selling of the lands

aforesaid; and the said sum of thirty-three thousand three hundred and forty dollars is now due and justly owing by the defendants above-named to this affiant, together with interest thereon from March 15, A. D. 1865.

WILLIAM STITT.

4 STATE OF PENNSYLVANIA,
County of Crawford:

Be it remembered that, on this third day of May, A. D. 1867, before me, a notary public, duly commissioned and sworn, in & for the State of Pennsylvania, personally came the above-named William Stitt, to me known, who, being by me duly sworn according to law, did depose and say that the facts contained in the above and foregoing affidavit are just and true, and correct in each and every particular.

In witness whereof I have hereunto set my hand and affixed my notarial seal the day and year aforesaid.

[SEAL.] HENRY B. BROOKS,
Notary Public.

5 In the circuit court of the United States in and for the western district of Pennsylvania, No.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Alfred Huidekoper and Frederick W. Huidekoper, citizens of the State of Pennsylvania, were summoned to answer William Stitt, a citizen of the State of New Jersey, of a plea of trespass on the case in assumpsit.

Whereupon the said plaintiff, by James K. Kerr, his attorney, complains that, whereas the defendants heretofore, to wit, on the 15th day of November, anno Domini 1864, at the district aforesaid, employed the plaintiff to sell for them, the said defendants, certain tracts or parcels of land situate in Venango County, containing about twelve hundred and eighty acres of land, for the price or sum of forty thousand dollars or more, and that, for his services so to be rendered to the defendants in and about the selling of the said tracts or parcels of land, he,
6 the said plaintiff, was to receive, and the said defendants did, at the district aforesaid, on the day and year aforesaid, promise to pay him, the said plaintiff, all sum or sums of money in excess of and over and above the sum of thirty-seven thousand five hundred dollars for which the said land might be sold.

And the said plaintiff avers that, confiding in the promises and undertakings of the said defendants so made by them, the said plaintiff, at the special instance and request of the defendants, used his endeavors to sell, and did, on the tenth day of January, anno Domini, 1865, at the city of New York, to wit, at the district aforesaid, sell the said tracts or parcels of land for the price or sum of seventy thousand eight hundred and forty dollars, and duly notified the defendants of such sale, and requested the defendants to make and deliver a good and sufficient deed or deeds of conveyance therefor, and tendered to the said defendants the sum of thirty-seven thousand five hundred dollars, (the con-
7 sideration aforesaid agreed upon,) which was refused by the defendants on the day and year aforesaid, at the district aforesaid. And the said plaintiff, in fact, saith that he, for his services so rendered on and about the selling of the said tracts or parcels of land, did reasonably deserve to have the sum of thirty-three thousand three hundred

and forty dollars, at the district aforesaid, whereof the said defendants then and there had notice.

And whereas, also, said defendants heretofore, to wit, on the first day of January, A. D. 1867, at Pittsburgh, to wit, at the district aforesaid, were indebted to the said plaintiff in the sum of fifty thousand dollars, for the work and labor, care and diligence of the said plaintiff by him, the said plaintiff, before that time done, performed, and bestowed on and about the business of the said defendants, and at their special instance and request, and for divers journies by the said plaintiff before that time made and performed in and about the said work and labor for the said defendants, and at their special instance and request; and

8 in the sum of fifty thousand dollars for money then and there received by the defendants for the use of the plaintiff; and in the sum of fifty thousand dollars for money found to be due from the defendants to the plantiff on an account then and there stated between them:

And whereas the defendants afterwards, to wit, on the day and year aforesaid, at the district aforesaid, in consideration of the premises, then and there promised to pay the said several sums of money, respectively, to the plaintiff on request; yet they have disregarded their promises, and have not *said* any of the said moneys, or any part thereof, although *after* requested so to do, to the plaintiff's damages seventy thousand dollars. And therefore he brings his suit.

By— JA'S K. KERR,
His Attorney.

9 UNITED STATES,
Western District of Pennsylvania, set:

[SEAL.] The President of the United States to the marshal of the western district of Pennsylvania, greeting:

We command you that you summon Alfred Huidekoper and Frederick W. Huidekoper, citizens of the State of Penn'a, late of your district, if they may be found therein, so that they be and appear before the judges of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, at a session of the same court, to be holden at Pittsburgh, on the first Monday of June next, to answer to William Stitt, a citizen of the State of New Jersey, for trespass on the case.

And have you then there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Pittsburgh, this 17th day of May, A. D. 1867, and in the 91st year of the independence of the said United States.

H. SPROUL, *Clerk.*

9½ (Indorsed:) No. 41. May term, 1867. William Stitt vs. Alfred Huidekoper & Frederick W. Huidekoper. Summons. Ja's K. Kerr.

PITTS., *May 29th*, 1869.

P. R. Gray is hereby deputized to serve the within summons.

THO'S A. ROWLEY,
U. S. Marshal.

Served May 31st, 1867, on Frederick W. Huidekoper, by giving him a true and attested copy of this writ, and making known to him the contents thereof.

Also, served same day on Alfred Huidekoper, by leaving a true and attested copy of this writ with an adult member of the family where he resides, in Meadville, Pa., and making known the contents thereof.

THO'S A. ROWLEY, *U. S. M.*,
So an's— WILLIAM H. JAMES,
Per *Deputy U. S. M.*

Marshal, $15.00.

10 *Affidavit of defence.*

Circuit court of the United States, western district.

WILLIAM STITT
vs.
ALFRED HUIDEKOPER AND FREDERICK W. Huidekoper.
No. 41. May term, 1867.

Alfred and Frederick W. Huidekoper, defendants in the above case, being severally sworn according to law, on oath say:

That they have a just and legal defence to the whole of pl'ff's claim in this case, and for further specification of their defence, they say:

1st. These defendants deny that they ever employed William Stitt, plaintiff in this case, either by verbal or written agreement, to sell any lands owned or controlled by said defendants. Said Stitt never was their agent for any purpose whatever, nor was he ever in their employment.

2nd. They therefore more particularly deny that they ever employed said William Stitt to sell 1,280 acres of land owned or controlled by defendants, for $40,000 or more, and that plaintiff, for his services, was to receive all proceeds of sales over $37,500.00.

3rd. That if said William Stitt attempted to sell any tracts of lands on or about Jan'y 10th, 1865, in New York, for or on behalf of defendants, he did it without authority from defendants, and he had no
11 power whatever to contract for or bind these defendants in any sale of lands.

4. That defendants refused to convey lands in Venango County, because they were under no agreement, verbal or written, to sell their lands, as William Stitt alleges.

5. These defendants deny that W'm Stitt has any claim against them, either just or legal, by which he is entitled to recover from defendants $33,340.00, or any sum whatever, for services rendered. Def'ts deny that he ever rendered them any services whatever, or that he was ever in their employment.

6. These defendants did, at one time permit said William Stitt, but did not employ him, to find a purchaser for defendants' lands, and to bring such purchaser to defendants; and they agreed to allow him a percentage if he succeeded in finding defendants a purchaser for their lands. But the time through which this permission extended was limited. Stitt did not find any purchaser within the time, and was duly notified that the time had expired, and that the permission was withdrawn.

7. Said defendants therefore deny that they owe W'm Stitt any amount whatever, and deny that the said Stitt has any just legal claim whatever against defendants.

A. HUIDEKOPER.
F. W. HUIDEKOPER.

12 Before me, the undersigned, a notary public of the city of Meadville, in Crawford County, Pa., personally came the above-named defendants, Alfred Huidekoper and Frederick W. Huidekoper, who, being by me duly sworn according to law, on oath say that the above affidavit is correct and true, as they verily believe.

A. HUIDEKOPER.
F. W. HUIDEKOPER.

Sworn and subscribed before me this June 10th, 1867.

C. M. WOOD,
Notary Public.

13 Circuit court of the U. S.

WILLIAM STITT
vs.
A. & F. W. HUIDEKOPER. } No. 41. May term, 1867.

And now, viz, April 10, 1868, defendants, by their attorneys, D. W. and A. S. Bell, come and defend the wrong, &c., and say:

1st. That they never employed plaintiff in any capacity, as alleged by him in his declaration.

2nd. That they never entered into any agreement with plaintiff, as he alleges in his declaration.

3rd. That they are not indebted to plaintiff in manner & form, as alleged by him in his declaration.

And of these several pleas defendants put themselves upon the country.

D. W. & A. S. BELL,
Att'ys for Defendants.

Filed April 10, 1868.

Whereupon plaintiff files the following amended narr:

14 In the circuit court of the United States in and for the western district of Pennsylvania, No. 41, May T., 1867.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Alfred Huidekoper and Frederick W. Huidekoper, citizens of the State of Pennsylvania, were summoned to answer William Stitt, a citizen of the State of New Jersey, of a plea of trespass on the case in assumpsit: Whereupon the said plaintiff, by James K. Kerr, his attorney, further complains that, heretofore, to wit, on the 15th day of November, A. D. 1864, at the county of Crawford, in the western district of Pennsylvania, the said defendants, pretending to have full, entire, and legal authority in the premises, did authorize, empower, and employ the plaintiff for the condsideration hereinafter mentioned, to bargain, negotiate a sale, and sell for them, the said defendants, certain tracts or parcels of land, situate, lying, and being in Allegheny Township, in the county of Venango, and Commonwealth of Pennsylvania, bounded and described as follows, to wit: "Three hundred and thirty-one
15 acres from the east end of tract No. one hundred and twenty four, (124,) bounded on the north, south & east sides by the tract lines, and on the west by land conveyed to David Cutler; also, one hundred and twenty-nine acres from the northwest corner of tract No. one

hundred and sixty-two (162,) bounded on the north and west by the tract lines, on the east by land conveyed to James M. Tyrrell, and on the south by land conveyed to Samuel Young; also, one hundred and five from the east end of tract No. one hundred and sixty-five, (165,) bounded on the north, south, and east sides by the tract lines, and on the west by lands conveyed to Benjamin Tyrrell; also, one hundred and sixty-four acres from tract No. one hundred and seventy-one, (171,) bounded on the north by the north line of the tract, on the east partly by the east line of the tract & by land of Jacob T. Miller, on the south by land of Jacob T. Miller, and on the west by land contracted for by Samuel W. Stewart; also, eighty-nine acres from the southeast corner of tract No. one hundred and seventy-two, (172,) bounded on the south and east by the tract lines, west by lands conveyed to John Siggins, and north by lands conveyed to Darius T. Lovell; also, one hundred and
16 eleven acres from the southeast corner of tract No. two hundred and eight, (208,) bounded on the east and south by the tract lines, on the west by lands conveyed to Sidney Pratt, and on the north by the land of the grantors as surveyed; also one hundred and sixty acres from the southwest corner of tract No. two hundred and thirteen, (213,) bounded on the south and west by the tract lines, on the north by land conveyed to John Sutherland, and on the east by lands conveyed respectively to John Rohrer and William T. Richardson; also, one hundred and five acres from the southwest corner of tract No. two hundred and twenty three, (223,) bounded on the west and south by the tract lines, on the north by land conveyed to John Griffin, and on the east by lands conveyed to David Kelley; also seventy acres from the northeast corner of tract No. two hundred and twenty-four, (224,) bounded on the north and east by the tract lines, on the west by lands conveyed to David Barrett, and on the south by land conveyed to C. H. Mattheuson; also, twenty-four acres of land from the southeast corner of tract No.
17 two hundred and twenty-five, (225,) bounded on the south and east by the tract lines, on the west by lands conveyed to John Grandin, and on the north by lands conveyed to L. Grandin, extending sixty-five perches from north to south. The whole land *and* mentioned containing twelve hundred and eighty-eight acres of land, net measure.

And plaintiff avers that the defendants did, then and there, employ the said plaintiff, under and by color of said agreement, to offer for sale, sell, and consum'ate a sale of said described tracts or parcels of land for the sum of forty thousand dollars or more, out of which sum of forty thousand dollars, so to be realized from the sale of the said described tracts or parcels of land, the said defendants did agree and promise to pay, and did bind themselves to pay, to the said plaintiff, for his services in procuring a purchaser or purchasers for the said tracts or parcels of land and negotiating a sale of the same, the sum of twenty-five hundred dollars.

And the said defendants did agree, with plaintiff then and there, that, in case the said plaintiff under the power and authority
18 aforesaid, so given to him for the purpose aforesaid, negotiated and effected a sale of said tracts or parcels of land for a larger and greater amount than the sum of forty thousand dollars, then and in that case, he, the said plaintiff, in addition to said sum of twenty-five hundred dollars, so as aforesaid to be paid by defendants, should receive, have, and retain for his own use all sums of money realized or to be realized from the sale of said tracts or parcels of land, exceeding the sum of forty thousand dollars (out of which sum of forty thousand dollars the plaintiff was to be paid twenty-five hundred dollars as aforesaid)

for his services in negotiating, effecting, and consum'ating a sale of said tracts of land as aforesaid described. Said defendants then and there further agreeing with the said plaintiff that, upon the said plaintiff procuring a purchaser or purchasers for said tracts or parcels of land above described, for the said sum of forty thousand dollars or more, and upon the payment of said sum of forty thousand dollars
19 for the same, they, the said defendants, would sign, seal, execute, and deliver to the purchaser or purchasers of said described tracts or parcels of land, good and sufficient conveyances and assurances in law for the same.

And the said plaintiff avers that, after the said agreement, so as aforesaid, was made by and between the plaintiff and said defendants, and in pursuance of said power and authority, so as aforesaid given and delegated to him by the said defendants, he, the said plaintiff, did employ his time, energy, and influence, and did labor diligently to procure a purchaser or purchasers for said described tracts or parcels of land, and did, in pursuance of said agreement and authority vested in him, endeavor to sell and negotiate a sale of said described tracts or parcels of lands, and did bestow upon said business of negotiating a sale of and selling said tracts or parcels of land, all his time, energy, and influence, and did expend a large sum of money in and about the procuring a purchaser or purchasers for the said described tracts
20 or parcels of land, and procuring a purchaser or purchasers for said lands, and effecting a sale of the same.

And the said plaintiff doth aver that, afterwards, to wit, on the nineteenth day of November, A. D. 1864, the said defendants, pretending to have full power and authority in the premises, and in order the more readily to facilitate the sale by the plaintiff, of the said described tracts or parcels of land, and as a contrivance for the purpose of enabling the said plaintiff whenever he should procure a purchaser or purchasers for said described tracts or parcels of land, without unnecessary delay, to effect and consum'ate a sale of said described tracts or parcels of land, did, at the special instance and request of the said plaintiff, at the western district of Pennsylvania, aforesaid, make and execute a certain deed of conveyance for the herein-above described tracts or parcels of land to the plaintiff, as hereinafter set forth, for the purpose of placing the said tracts or parcels of land under the control of the plaintiff, and as a contrivance to enable the said plaintiff to negotiate and effect a sale of said tracts or parcels of land, said deed be-
21 ing intended to operate and have the effect of formal letters of attorney to the plaintiff, for the purpose of selling and negotiating a sale of the said described premises; which said deed is in the words following, to wit:

"This indenture, made the nineteenth day of November, in the year of our Lord on' thousand eight hundred and sixty-four, between Alfred Huidekoper and Catharine, his wife, said Alfred, executor of Harm Jan Huidekoper, deceased, and said Alfred and Frederick W. Huidekoper, executors of Edgar Huidekoper, deceased, all of the county of Crawford, State of Pennsylvania, of the first part, and William Stitt of the county and State aforesaid; that the said parties of the first part for and in consideration of the sum of forty thousand dollars, money of the United States to them in hand paid by the said party of the second part at and before the sealing and delivery of these presents; the receipt and payment whereof they do hereby acknowledge, have granted, bargained, sold, released, and confirmed, and by these presents do grant, bargain, sell, release, and confirm unto the said

22 party of the second part, and to his heirs and assigns all those pieces of land situate in Allegheny Township, in the county of Venango, and State of Pennsylvania, described as follows, viz: Three hundred thirty-one acres from the east end of tract No. one hundred and twenty-four, (124,) bounded on the north, south, and east sides by the tract lines, and on the west by lands, conveyed to David Cutler; also, one hundred twenty-nine acres from the northwest corner of tract No. one hundred and sixty-two, (162,) bounded on the north and west by the tract lines, on the east by land conveyed to James M. Tyrrell, and on the south by land conveyed to Samuel Young; also, one hundred and five from the east end of tract No. one hundred and sixty-five, (165,) bounded on the north, south, and east sides by the tract lines, and on the west by lands conveyed to Benjamin Tyrrell; also, one hundred and sixty-four acres from tract No. one hundred seventy-one, (171,) bounded on the north by the north line of the tract, on the east, partly by the east line of the tract and by land of Jacob T. Miller, on
23 the south by land of Jacob T. Miller, and on the west by land contracted for by Samuel W. Stuart; also, eighty-nine acres from the southeast corner of tract No. one hundred seventy-two, (172,) bounded on the south and east by the tract lines, west by lands conveyed to John Siggins, and north by lands conveyed to Darius J. Lovell; also, one hundred and eleven acres from the south-east corner of tract No. two hundred and eight, (208,) bounded on the east and south by the tract lines, on the west by lands conveyed to Sidney Pratt, and on the north by the land of the grantors as surveyed; also, one hundred and sixty acres from the southwest corner of tract No. two hundred and thirteen, (213,) bounded on the south and west by the tract lines, on the north by land conveyed to John Southerland, and on the east by lands conveyed respectively to John Rohrer and William S. Richardson; also, one hundred and five acres from the southwest corner of tract No. two hundred and twenty-three, (223,) bounded on the west and south by the tract lines, on the north by land conveyed to John Griffin, and on the east by lands conveyed to David Kelly; also, seventy acres from the north-east corner of tract No. two hundred and
24 twenty-four, (224,) bounded on the north and east by the tract lines, on the west by lands conveyed to David Barrett, and on the south by land conveyed to C. H. Matthewson; also, twenty-four acres of land from the southeast corner of tract No. two hundred and twenty-five, (225,) bounded on the south and east by the tract lines; on the west by lands conveyed to John Grandin, and on the north by lands conveyed to S. Grandin, extending sixty-five perches from north to south. The whole lands herein conveyed containing twelve hundred eighty-eight acres, net measure.

Together with all and singular the rights, liberties, privileges, hereditaments and appurtenances whatsoever thereinto belonging, and the reversions and remainders, rents, issues, and profits thereof; and also all the estate and interest whatsoever of them the said parties of the first part, in law or equity of, into, or out of the same: To have and to hold the premises hereby granted, or intended so to be, with the appurtenances unto the said party of the second part, his heirs and assigns, to the use of the said party of the second part, his heirs and
25 assigns forever; and the said parties of the first part, their heirs, executors, and administrators, do hereby covenant and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, their heirs, the above-mentioned and described premises, with the appurtenances unto the said party of

the second part against the said parties of the first part, and their heirs, and against all and every person or persons whomsoever, lawfully claiming or to claim the same by, from, through, or under them, shall and will warrant, and forever defend, by these presents. In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

"ALFRED HUIDEKOPER [SEAL.]
"CATHERINE HUIDEKOPER. [SEAL.]
"ALFRED HUIDEKOPER, [SEAL.]
"FREDERICK W. HUIDEKOPER, [SEAL.]
"*Executors of Edgar Huidekoper, dec'd.*
"ALFRED HUIDEKOPER,
"*Executor of Harm Jan Huidekoper, dec'd.*

"Sealed and delivered in presence of—
"W'M DAVIS, JR.

26 "STATE OF PENNSYLVANIA,
"*Crawford County, ss:*

"Before me, the subscriber, for the said county, personally came the above-named Alfred Huidekoper and Catherine, his wife, and acknowledged the above indenture to be their act and deed, to the end that the same might be recorded as such. She, the said Catherine, being of full age, and by me, separate and apart from her said husband, duly examined, and the contents of the above indenture fully made known to her, declared that she did, voluntarily and of her own free will and accord, and without any coercion or compulsion on the part of her said husband, sign, seal, execute, and deliver the same. The said Alfred also acknowledged the same as his act as executor of Harm Jan Huidekoper, deceased. Said Alfred and Frederick W. Huidekoper personally acknowledged the same as their act, as executors of Edgar Huidekoper, dec'd, and desired it to be so recorded.

"In witness whereof I have hereunto set my hand and seal this 21 day of November, 1864.

"W'M DAVIS, [SEAL.]
"*Associate Judge.*

27 " COUNTY, *ss:*

"Recorded in the recorder's office, County, in deed-book, page .

"Witness my hand and seal of said office, this day of , 18 .

Recorder."

[$20 Gov't stamp, A. & F. W. H.] [$20 Gov't stamp, A. & F. W. H.]

And plaintiff avers that said deed of conveyance as above recited was made by the defendants to the said plaintiff in lieu of a formal letter of attorney in the premises, and that said deed was executed as a contrivance to enable the plaintiff, without delay, to negotiate and effect a sale of said tracts or parcels of land; and that the same was duly signed, sealed, acknowledged, and stamped by defendants, and deposited by them in the hands and custody of Mess. Drake
28 Brothers, bankers, residing and doing business in the city of New York, with special instructions from the defendants to said Drake

Brothers, that said deed so as aforesaid made and executed by the defendants, (as a contrivance in order to facilitate the sale of said described lands,) be delivered by them, the said Drake Brothers, to plaintiff, upon the payment to them, the said Drake Brothers, of the said sum of forty thousand dollars stipulated in said deed to be paid.

And plaintiff avers that, afterwards, to wit, on the 10th day of January, A. D. 1865, at the city of New York, in pursuance of said agreement so made between the plaintiff and defendants, and said power and authority so given by the defendants to the plaintiff as hereinbefore set forth, the said plaintiff did effect and negotiate a sale of the said described tracts or parcels of land to a certain Seth A. Backus and Joseph Morse, jr., with whom the said plaintiff, did, on the 10th day of January, A. D. 1865, enter into a contract in writing for the sale by plaintiff and purchase by the said Backus and Morse
29 of the said described tracts or parcels of land, which said contract is in the words following, to wit:

"This agreement made this 10th day of January, 1865, between William Stitt, of Meadville, Pa., party of the first part, and Seth A. Backus and Joseph Morse, jr., of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar to him paid, hereby agrees to sell to the party of the second part all those certain pieces or parcels of land lying and being in Allegheny Township, Venango Co., Pa., and described as follows: Being all the lots marked in red or pink on a map furnished by said Stitt to the parties of the second part, or said party of second part may elect to take the lots of 105 acres on No. 165 or No. 172, and 171 and No. 213, making 518 acres, or all the balance of 1,288 acres, rejecting the 518 acres or the whole 1,288 acres, as they see fit. The price for the land taken to be fifty-five dollars per acre. If the said Backus and Morse, or their assigns, decide to take either portion or all of said lands, they are to deposit with Drake & Brothers, 23 William st., on or before the
30 14 inst., ten thousand dollars, to be paid to said party of the first part as soon as the titles are examined and found perfect; and the deed is to be deposited with the same parties until the balance of the purchase-money is paid, or satisfactorily secured to the party of the first part, when the deed is to be delivered to the party of the second part. The time of payment for the balance is not to be extended beyond sixty days from the date of the first payment, and may be made at any time by depositing with Drake & Brothers. If said deposit is not made with Drake & Brothers by the 14th inst., (the deposit of the ten thousand dollars,) then this agreement to be null and void.

"Witness our hands and seals this 10 day of Jan'y, 1865.

"WILLIAM STITT. [ ]
"S. A. BACKUS. [ ]
"JOSEPH MORSE, JR. [ ]

"CYRUS TABER.
"N. F. JONES."

[5-ct., canceled Jan'y 14, 1865.]

"NEW YORK, *Jan'y* 14, 1865.

"Backus & Morse have this day deposited with us ten thousand dollars on the within contract, and elect to take the whole 1,288 acres, it being at the same time agreed and understood that, if the title is
31 not valid, the above $10,000 is to be returned to Backus and Morse; and if the balance of the purchase-money is not deposited

by the time specified in the contract, the $10,000 to be forfeited to Mr. Stitt.

(Signed) "DRAKE BROTHERS."

That, in pursuance of said contract so entered into by and between the said plaintiff and said Backus and Morse, and for the purpose of carrying into effect the terms and conditions of the same, the said Backus and Morse did, on the fourteenth day of January, A. D. 1865, deposit with said Drak' Brothers, for the use of said defendants, the sum of ten thousand dollars, and did then and there elect to take the whole 1,288 acres of land on said contract mentioned, as appears by the indorsement written on said contract, before referred to, in the words following, to wit:

"NEW YORK, *Jan'y* 14, '65.

"Backus and Morse have this day deposited with us ten thousand dollars on the within contract, and elect to take the whole 1,288 acres, it being at the same time agreed and understood that, if the title
32 is not valid, the above $10,000 is to be returned to Backus and Morse; and if the balance of the purchase-money is not deposited by the time specified in the contract, the $10,000 to be forfeited to Mr. Stitt.

"DRAKE BROTHERS."

And plaintiff avers that the defendants had full notice of the contract of sale so made by the plaintiff with said Seth A. Backus and Joseph Morse, jr., in pursuance of his authority so given as aforesaid, and that said defendants afterwards had full notice that the said Backus and Morse, in pursuance of their said contract with the plaintiff, did, on the 14 day of January, A. D. 1865, deposit*ed* the sum of ten thousand dollars with Messrs. Drake Brothers, bankers, of New York City, for the use of the defendants in part payment of purchase-money for said tracts or parcels of land, and that on said day they, the said Backus & Morse, did elect to purchase all the above-described lands, and that for the purpose of carrying into effect the contract for the sale and purchase of said lands, upon the terms and conditions of said contract, the said
33 defendants, on the 20th day of January, A. D. 1865, caused to be made, and did furnish to said Drake Brothers, an abstract of title to said tracts of land, with special instructions to said Drake Brothers to deliver the same to the plaintiff for the use of said Backus & Morse, who had agreed to purchase the said lands so as aforesaid described for the sum of seventy thousand eight hundred and forty dollars.

And the said plaintiff avers that, upon the delivery to said Drake Brothers, by the defendants, of the abstract of title to the premises aforesaid, and upon examination of the same, the said Backus & Morse, to whom the said tracts of land had been sold by the plaintiff as aforesaid, became satisfied that the title to said premises was, at the time of their entered into said contract for the purchase of the same, under the control of the defendants, and conveyed by them by said deed aforesaid.

Whereupon the said Backus and Morse were willing, in pursuance of their said contract, to pay the balance of the purchase money then remaining to be paid, in accordance with the terms of said contract,
34 to wit, the sum of sixty thousand eight hundred and forty dollars, and then and there offered to deposit the said sum of money with said Drake Brothers, as required by the terms of the*re* said contract upon the delivery to them of a good and sufficient deed for said described tracts or parcels of land.

And the said plaintiff avers that, afterwards, to wit, on the twenty-seventh day of January, A. D. 1865, he, the said plaintiff, offered to pay to said Drake Brothers, for the use of the said defendants, the sum of forty thousand dollars, (out of which sum of money the said defendants were bound, in pursuance of their aforesaid agreement with plaintiff, to pay him, said plaintiff, the sum of twenty-five hundred dollars,) and demanded the delivery by them, the said Drake Brothers, to him, the said plaintiff, of said deed so as aforesaid made and executed by the defendants.

Whereupon said Drake Brothers then and there did refuse to deliver said deed on said tender and demand so as aforesaid made by the
35 said plaintiff, alleging that said refusal to deliver the same was in pursuance of telegraphic instructions received by the said Drake Brothers from the said defendants; and plaintiff avers that the said telegraphic instructions so received by the said Drake Brothers from the defendants did substantial'y direct them, the said Drake Brothers, to with'old the delivery of said deed to plaintiff, and to retain the same in their possession; and that the said telegraphic instructions were given after the said defendants had notice and full knowledge of the contract of sale so entered into by Messrs. Backus & Morse for the purchase by them of the said described tracts or parcels of land for the sum of seventy thousand eight hundred and forty dollars; and pl'ff avers that said telegraphic instructions so as aforesaid given by the defendants to said Drake Brothers were in fraud and in disregard of the agreement so made by the defendants with plaintiff as hereinbefore set forth, and in utter violation of his rights in the premises, and tended to his manifest injury and damage to the sum of seventy thousand dollars.

36 And the said plaintiff doth further aver that, by reason of the agreement so as aforesaid made by and between the plaintiff and defendants in the premises, and the execution, and delivery to Drake Brothers, of the deed aforesaid, and the sale by the plaintiff of the above-described tracts or parcels of land to Seth A. Backus and Joseph Morse, jr., for the sum of seventy thousand eight hundred and forty dollars, the said plaintiff became, and was entitled to receive from the defendants, and the said defendants were bound to pay to him for his services in negotiating, effecting and consum'ating a sale of the said described tracts or parcels of land the sum of twenty-five hundred dollars, as well as the further sum of thousand eight hundred and forty dollars, being the amount in excess of forty thousand dollars, which the defendants had agreed to allow and permit the plaintiff to have, receive, and retain for his own use for his services in negotiating and effecting a sale of the said described tracts or parcels of land.

And plaintiff avers that, by reason of the fraudulent acts of
37 the defendants on the premises, and their fraudulent instructions given, as aforesaid, to said Drake Brothers, and the non-delivery to him, the said plaintiff, of the said deed aforesaid, he, the said plaintiff, has been deprived and prevented from carrying into effect the sale, so as aforesaid made by him to Seth A. Backus and Joseph Morse, jr., for the sum of seventy thousand eight hundred and forty dollars, as aforesaid, and has been deprived and prevented by the defendants' said fraudulents acts from receiving and retaining, for his own use and benefit, the sum of thirty thousand eight hundred and forty dollars, which he was entitled to receive, have, and retain, and would have received from the amount to be realized from the sale of said lands aforesaid in excess of the sum of forty thousand dollars, for which sum (and as

much more as he could obtain for said lands,) he was employed to negotiate a sale of said tracts or parcels of land by the defendants.

And plaintiff avers that, by reason of the said fraudulent acts
38 of the defendants and the fraudulent instructions given to said Drake Brothers, and for his services as aforesaid, in negotiating and effecting a sale of said described tracts or parcels of land for a sum not less than forty thousand dollars, he, the said plaintiff, is entitled to receive from the defendants, and the said defendants are bound to pay him, for his services in negotiating and effecting a sale of the said described tracts or parcels of land, the sum of twenty-five hundred dollars, in addition to the said sum of thirty thousand eight hundred and forty dollars aforementioned, amounting in the aggregate to the sum of thirty-three thousand three hundred and forty dollars.

And for that whereas, also, heretofore, to wit, on the 15th day of November, A. D. 1864, at the county of Crawford, in the western district of Pennsylvania, the said defendants, pretending to have fully and legal authority on the premises, did authorize, empower and employ the plaintiff for hire and reward to bargain, negotiate a sale, and
39 sell for them, the said defendants, certain tracts or parcels of land, situate, lying, and being in Allegheny Township, in the county of Venango, in the western district aforesaid, containing twelve hundred and eighty-eight acres of land net-measure, and did employ the said plaintiff to offer for sale, sell, and consum'ate a sale of said tracts of lands, for the sum of not less than forty thousand dollars, out of which sum of forty thousand dollars, so to be realized from the sale of said tracts of land, the defendants did agree and bind themselves to pay to the said plaintiff the sum of twenty-five hundred dollars, and in addition thereto, all sums that he should receive therefor over and above forty thousand dollars; and defendants did then and there authorize and employ the said plaintiff to negotiate and sell for said defendants the sa'd tracts of land, so situate as aforesaid, for a larger and greater sum than forty thousand dollars, and in case the said plaintiff negotiated a sale and sold the said tracts of land for a greater and larger sum than forty thousand dollars, then and in that case, the said defendants
40 did agree with plaintiff that, in addition to said sum of twenty-five hundred dollars, he, the said plaintiff, should receive, have and retain, for his own use, all sums of money realized or to be realized from the sale of said lands over and above the said sum of forty thousand dollars aforesaid, for his services in procuring a purchaser or purchasers for said lands, and effecting and negotiating a sale of the same; said defendants, then and there further agreeing with the said plaintiff, that, upon the said plaintiff procuring a purchaser or purchasers for said tracts of land for a sum of not less than forty thousand dollars, and upon the payment of said sum of money for the same, the said defendants would sign, seal execute, and deliver to the purchaser or purchasers of said tracts of land, good and sufficient conveyances and assurances *a* law for the same.

And the said plaintiff avers that, afterwards, to wit, on the 19th day of November, A. D. 1864, the said defendants, pretending to have full power and authority on the premises, and in order the more readily
41 to facilitate the sale by the plaintiff of the said tracts of land, and as a contrivance for the purpose of enabling the said plaintiff, whenever he should procure a purch'er or purch'ers for said tracts of land, without delay, to consum'ate a sale of said tracts of land, did, at the special instance and request of said plaintiff at the district aforesaid, make, seal, acknowledge and stamp a certain deed of conveyance

for said land to the plaintiff, for the purpose of placing said tracts of land under the control of the plaintiff, and as a contrivance to enable the said plaintiff to negotiate a sale and effect a sale of the said tracts of land without delay, which said deed was by defendants deposited in the custody of Messrs Drake Brothers, doing business in New York City, as bankers, with special instructions from said defendants to said Drake Brothers that said deed, so as aforesaid made as a contrivance in order to facilitate a sale of said lands, be delivered to said plaintiff on the payment by plaintiff of the sum of forty thousand dollars stipulated in said deed; which said deed, sealed with the seals of the defendants, the plaint-
42 iff now brings here into court, the date whereof is the day and year aforesaid.

And plaintiff avers that, after the said agreement, so as aforesaid, was made between the said defendants and the plaintiff, wherein the said defendants did employ the said plaintiff to sell said lands, and in pursuance of the authority, so as aforesaid given to him by the defendants, and after the execution of the deed given as a contrivance as aforesaid, he, the said plaintiff, did employ his time, energy, and influence, and did labor diligently to procure a purchaser or purchasers for said tracts of land, and did bestow upon said business of negotiating a sale of, and selling said tracts of lands, all his time, energy, and influence, and did expend a large sum of money in and about the procuring a purchaser or purchasers for said tracts of land, for the sum of not less than forty thousand dollars.

And plaintiff avers that, afterwards, to wit, on the 10th day of January, A. D. 1865, at the city of New York, in pursuance of said
43 agreement and employment by the defendants, and by virtue of the power vested in said plaintiff by said deed, so as aforesaid executed by the said defendants, he, the said plaintiff, did effect and negotiate a sale of the said tracts of land to a certain Seth A. Backus and Joseph Morse, jr., with whom said plaintiff did, on the said 10th day of January, A. D. 1865, enter into a written contract for the sale to them, and the purchase by said Backus and Morse of said tracts of land, or such portion thereof as the said Backus and Morse would elect to purchase; which said written contract, sealed with the seals of the parties thereto, the plaintiff now brings here into court, the date whereof is the day and year aforesaid.

And whereas, on the 14th day of January, A. D. 1865, the said Seth A. Backus and Joseph Morse, jr., did elect to purchase all of said lands, amounting to twelve hundred and eighty-eight acres, for the price or sum of seventy thousand eight hundred and forty dollars, and did then and there deposite with said Drake Brothers the sum of ten thou-
44 sand dollars as a part of said purchase-money, and agreed to pay the balance of said purchase-money, to wit, the sum of sixty thousand eight hundred and forty dollars, on the delivery to them of a good and sufficient deed for said tracts of land.

And plaintiff avers that, afterwards, to wit, on the 27 day of January, A. D. 1865, he tendered to said Drake Brothers the said sum of forty thousand dollars, and demanded the delivery by them, the said Drake Brothers, to him, the said plaintiff, by the defendants, which was refused by said Drake Brothers.

And plaintiff further avers that defendants, well knowing the premises, and with a full knowledge that the said plaintiff had negotiated and effected a sale of said tracts of land with Seth A. Backus and Joseph Morse, jr., for the sum of seventy thousand eight hundred and forty dollars, did fraudulently and with the intention of preventing and de-

priving the said plaintiff from realizing, receiving, and retaining for his own use all sums of money exceeding the sum of forty thousand
45 dollars on the sale aforesaid to Seth A. Backus and Joseph Morse, jr., of said tracts of land, as well as depriving the said plaintiff from receiving from the defendants the sum of twenty-five hundred dollars which he is justly entitled to be paid by the defendants for his services in negotiating said sale, did direct the said Drake Brothers not to deliver the said deed to plaintiff.

And plaintiff avers that, by reason of the fraudulent acts of the defendants on the premises, and there fraudulent instructions given to said Drake Brothers, and the non-delivery to him, the said plaintiff, of the said deed aforesaid, he, the said plaintiff, has been deprived and prevented from carrying into effect the sale of said tracts of land, so as aforesaid, made to Seth A. Backus and Joseph Morse, jr., for the sum of seventy thousand eight hundred and forty dollars as aforesaid, and has been deprived and prevented by defendants from receiving and retaining for his own benefit the sum of thirty thousand eight hun-
46 dred and forty dollars which he was entitled to receive, have, and retain, and would have received from the amount to be realized from the sale of said lands aforesaid, in excess of the sum of forty thousand dollars, for which sum he was employed to negotiate a sale of said lands by the defendants.

And plaintiff avers that, by reason of the premises and for his services so as aforesaid, on negotiating and effecting a sale of said tracts of land for a sum not less than forty thousand dollars, he, the said plaintiff, is entitled to recover and receive from the defendants, and the said defendants are bound to pay him for his services in negotiating a sale and effecting a sale of the said tracts of land, the sum of twenty-five hundred dollars in addition to the said sum of thirty thousand eight hundred and forty dollars, aforementioned, amounting in the aggregate to the sum of thirty-three thousand three hundred and forty dollars.

And the said defendants, afterwards, to wit, on the first day of May, A. D. 1867, at the district aforesaid, well knowing the premises,
47 promised the said plaintiff that they, the said defendants would pay to the said plaintiff, on request, the sum of twenty-five hundred dollars for his services rendered in negotiating a sale and effecting a sale of the said described tracts or parcels of land, as well as the further sum of thirty thousand eight hundred and forty dollars, which he was entitled to receive, have, and retain for his own use, out of the proceeds to be realized from the sale aforesaid, for his services in negotiating a sale and consum'ating a sale of the said described tracts or parcels of land in excess of the sum of forty thousand dollars, amounting in the aggregate to the sum of thirty-three thousand three hundred & forty dollars. But the said defendants, not regarding their said promises, and undertakings, but contriving and fraudulently intending craft'ly and subtly to deceive and defraud the said plaintiff in that behalf, have not yet paid the said sums of money, or any part thereof, to the said plaintiff, although often requested so to do, but the said
48 defendants to pay the same have hitherto wholly neglected and refused, and still do neglect and refuse so to do, to the damage of said plaintiff one hundred thousand dollars and therefore he brings suit.

JAMES K. KERR,
Att'y for Plaintiff.

FEBRUARY 13, 1868.

49

50 WILLIAM STITT
vs.
A. & F. W. HUIDEKOPER. } 41. May term, 1867.

And now, May 10, 1871, on leave given, the special count to the narr, filed with the præcipe is withdrawn, and the common counts of said narr incorporated with and made part of the amended narr filed Feb'y, 19, 1868.

Per curiam.

51 WILLIAM STITT
vs.
A. & F. W. HUIDEKOPER. } No. 41. May term, 1867.

And now, May 9th, 1871, the parties in this cause being at issue, a jury being called, came, to wit: J. P. Taylor, H. N. Lane, F. E. Jayne, J. R. McLean, Thomas Stewart, W'm Moorhead, Sam'l R. Moore, J. K. McConaghy, Rob't Carnahan, Benj. K. Craig, Elias Radcliffe, F. Schneider, twelve good and lawful men, who, having been duly summoned and returned were duly sworn to well and truly try this issue and a true verdict render according to the evidence.

52 The depositions of Joseph Casey, Jared C. Marcy, Joseph Morse jr., William F. Drake, Simeon E. Church, Samuel Q. Brown, Louis Gerner, Stephen H. Thayer, and Edward L. Halsted, witnesses, commenced to be taken before me, Charles Nettleton, commissioner named in the agreement signed by the attorneys for the plaintiff and for the defendants in the suit hereinafter referred to, hereto annexed, on the 21st day of October, A. D. 1868, at my office, No. 111 Broadway, in the city, county, and State of New York, in the presence of counsel for the plaintiff and for the defendants, to be used and read in evidence in a certain cause pending in the circuit court of the United States for the western district of Pennsylvania, wherein William Stitt is plaintiff, and Alfred Haidekoper et al. are defendants, taken on behalf of the plaintiff in pursuance of said agreement and upon the verbal interrogatories and cross-interrogatories herein appearing.

53 JOSEPH CASEY, of lawful age, being by me first examined, cautioned and solemnly sworn to testify the whole truth, deposeth and saith in answer to the following questions, as follows:

Question 1. What is your name and reside?

Ans. My name is Joseph Casey. I reside in the city of Washington, D. C.

Question 2. You are, I think, judge of the U. S. Court of Claims?

Answer. I am chief justice of that court.

Question 3. Do you know the plaintiff and defendants in this suit?

Answer. I know William Stitt, the plaintiff, and Alfred and Frederick W. Haidekoper, of Meadville, Pennsylvania.

Question 4. Were you at any time in the years 1864 and 1865 interested in the purchase of oil lands in Pennsylvania?

54 Answer. I was not.

Question 5. Were you interested in oil developments in Pennsylvania?

Answer. I was.

Question 6. State now what you know of any transactions between the parties in referenee to real estate matters in Pennsylvania?

Answer. In the autumn of 1864, in the latter part of November, I met the plaintiff, W'm Stitt, at the Astor House, in this city. I was at that time in negotiations with capitalists in this city for the sale of some oil lands near Oil City, in Venango County, Pennsylvania.

(Counsel for defendants objects to anything stated by Mr. Stitt, or any conversation with Mr. Stitt as incompetent.)

Mr. Stitt proposed to sell to me several tracts of land on or near Pitt-Hole Creek, Venango County, Pennsylvania, amounting to nearly 1,300 acres. I inquired of him as to what right he had to dispose of
55 it. He informed me that the lands had belonged to the Messrs. Huidekoper; they had made a deed to him of the lands, and that the deed was in the hands of parties in the city of Philadelphia in escrow. I refused to enter into negotiations with him unless he would either procure a written contract from the Messrs. Huidekoper or have the deed transferred and deposited with parties in this city. I suggested the names of Messrs. Fiske & Hatch, bankers, Wall st., who were agents of Jay Cook & Co. at that time. Mr. Stitt assured me that he would have it done. Some two or three days after this conversation, Mr. Stitt and Mr. Frederick W. Huidekoper came together to the office of Walden & Williard, about No. 9 or 11 Broad street, New York City, where I met them. I had not met Frederick W. Huidekoper before that time. He was a stranger to me before this. I had known Alfred Huidekoper before. After being introduced to Mr. F. W. Huidekoper, and the interchange of the usual civilities, he said that he understood I was negotiating for some lands which they had deeded to Mr. Stitt. I told him Mr. Stitt had proposed to negotiate for
56 the lands. The difficulty in the way had been the want of some written authority or title in Mr. Stitt's possession to dispose of the lands. He then said that would be obviated by the deposit of the deed in escrow in this city, and that for that purpose he had brought the deed with him and inquired of me if that would be satisfactory. I told him it would if deposited with the gentlemen named, that was Fisk & Hatch. He then stated he was unacquainted with those gentlemen, but there was another firm not far from them, one of the firm was named Drake. I do not remember the name of the firm. He say they were gentlemen of the highest respectability and good standing. I told him that would answer the same purpose as if deposited with Fisk & Hatch. I then stated to him that, so far as that was concerned, it was all satisfactory, but there was another difficulty in the way which I wished to have obviated and that was to have the time fixed within which the deed might be delivered upon payment of the consi-
57 deration-money. I stated to Mr. Huidekoper that the negotiation in which I was engaged was a large one and might require a considerable time for its consum'ation, but in the meantime he might withdraw the deed from escrow and defeat my negotiations in midway. He stated it was not necessary to have any time designated, it was for the interest of Mr. Stitt that no time should be designated, but Mr. Stitt should have all the time that was necessary to complete the negotiations for the sale of the land. He said Mr. Stitt was their neighbor and friend, and they were dealing together in mutual confidence which such relations inspired. They were entirely satisfied with the price to be paid and that whatever advance could be obtained they wished Mr. Stitt to have the advantage of. The deed should remain a deposit

where he would place it until a sale was effected or until Mr. Stitt should notify them that his negotiations were at an end. He stated further that he would give directions to the parties with whom he deposited the deed to let myself or any parties whom I might
58 send there see and examine it at any time we desired. This was the substance of the conversation which took place between us in the matter. This conversation was had in the last days of November or the first days of December, 1864. It was the one side or the other within a week each way of the 30th of November, 1864. My impression is that it was before the 30th of November, 1864—a few days, two or three days probably, but I will not be confident as to the precise time. At this conversation Mr. Huidekoper produced the deed referred to and showed it to me.

Question 7. Was there a map used by you on the occasion of that last converation?

Answer. No; not on that occasion, but I had in my possession a map which Mr. Stitt had given me, showing the location and boundaries of the several tracts of land which he had proposed that I should negotiate for with him. That was sometime before this conversation
59 took place. At the time that Mr. Huidekoper produced the deed I read the description of the tracts contained in the deed, and found it to embrace the several tracts of land which Mr. Stitt proposed to sell, amounting to nearly 1,300 acres. The paper shown to me now is the map in question which I had at that time. It is hereto
"EX. "A." annexed, marked "A." I identify it by finding the words "McCasland's Run" in pencil on the map in my handwriting. The tracts I was negotiating for are those shown on this map in pink color and are the same tracts comprised in the said deed. Some two or three weeks subsequent to the date of the conversation with Mr. Huidekoper, I was compelled to return to Washington, in consequence of the opening of my court. I gave Mr. Stitt notice before I left, that my negotiations for his land had failed, and nothing more was done about it with me. The term of my court commenced the first Monday in October, but had been adjourned to about the 15 of December.

60 Cross-examined by counsel on behalf of defendants:

X-q. 1. How long had you been in the city of New York before you had this conversation with Mr. Huidekoper?

Answer. I cannot say. I was in New York some four or five weeks in all. I was in New York on the day of the presidential election.

X-q. 2. How do you fix within the limits you have given, that is, one week before or after November 30, the time of that conversation?

Answer. On November 29th or 30th—I am not confident which day—I entered into a written contract with Mr. Stitt, giving me the option for a certain length of time to purchase these lands at a designated price—and it was either a few days before or after—my impression is that it was a day or two after Mr. Huidekoper was here that I
61 entered into that contract. This is the principal means which I have to enable me to fix the date, but my memory as to dates is pretty good.

X-q. 3. With what did you make the comparison of the description of the lands in the deed at the time of the conversation with Mr. Huidekoper?

Answer. From my general recollection of the tracts of land as laid down upon the map and the description of them contained in the deed.

X-q. 4. Where was the map at the time of that conversation, if you know?

Answer. I don't know whether I had it in my possession or not.

X-q. 5. Have you stated all the conversation that passed between you and Mr. Huidekoper, relating to those lands, at that time, so far as you recollect it?

Answer. I have stated the substance of the whole conversation as I now recollect it.

62 X-q. 6. Do you recollect Mr. Huidekoper stating that he had brought the deed with him from Philadelphia?

Answer. I don't know whether he said he had got it—he had it with him.

X-q. 7. Are you able, from your present recollection, to give the exact words used by Mr. Huidekoper in this conversation or any part of it?

Answer. I only pretend to give the substance.

X-q. 8. How long before the conversation with Mr. Huidekoper did obtain the map and from whom did you *you* obtain it?

Answer. I don't know how long I had it. I obtained it, I think, from Mr. Stitt.

X-q. 9. How many times did you see Mr. Stitt before the conversation with Mr. Huidekoper?

Answer. I can't tell. I had seen him frequently. I saw Mr. Stitt first, probably about a week or ten days before I saw Mr. Huidekoper.

63 (Signed) JOS. CASEY.

The taking of further testimony in the foregoing entitled cause in pursuance of the annexed agreement, is now adjourned, at the request and by consent of counsel for the plaintiff and for the defendants, until the 22nd day of October, A. D. 1868, at 10 o'clock a. m., at my said office.

(Signed) CHARLES NETTLETON,
Commissioner.

64 NEW YORK CITY, NO. 111 BROADWAY,
October 22nd, 1868—10 *a. m.*

Counsel for the plaintiff and defendants being present, but no witness being produced, the taking of further testimony in the cause is, at the request of the counsel attending, adjourned until to-morrow the 23rd October, 1868, at 10 o'clock a. m., at my said office.

NEW YORK CITY, NO. 111 BROADWAY,
October 23d, A. D. 1868—10 *o'clock a. m.*

The taking of testimony in this cause is now resumed in pursuance of the foregoing adjournments, counsel for the plaintiff and for the defendants being in attendance.

65 JARED C. MARCY, of lawful age, being by me first examined, cautioned, and solemnly sworn to testify the whole truth, deposeth and saith, in answer to the following questions, as follows:

Question 1. What is your name and & occupation?

Answer. My name is Jared C. Marcy, and I am an attorney at law.

Ques. 2. Were you in 1864, interested more or less in oil matters, in Pennsylvania?

Answer. Yes; to a certain extent.

Ques. 3. Do you know the parties to this suit, plaintiff and defendents?

Answer. I do know the parties to this suit. I resided in the same town 14 or 15 years with them, in Meadville, Pennsylvania.

Ques. 4. State what you know respecting any transactions between them in real estate, in the year 1864 or 1865?

66 (Answer taken subject to all legal objections.)

Answer. In the fall of 1864, I think, either before or immediately after the presidential election—I cannot give the precise date; I have nothing particular to fix the date in my mind—I came to Meadville, where I then lived, and Mr. Stitt came to me, with the desire to have me sell for him 1,300 acres of land at, in, and about the vicinity of Pit-Hole Creek and Stewart's Run, stating to me the terms o which he had received and from whom he received it—Messrs. Alfred & Frederick W. Huidekoper, Alfred for himself, and two as executors of Edgar Huidekoper. As I had some little time I concluded I would go and see Mr. Huidekoper myself on the subject, as I should be better satisfied seeing him. It looked to me like a desirable property. I went to the office of the Messrs. Huidekoper and saw Alfred. Asked him about property he had subject to sale. Stated to him that I was and had

67 been for some little time somewhat engaged in the disposal of lands in Philadelphia, in connection with some other parties. He told me that all the lands he had left for sale had been placed in the hands of W'm Stitt. I stated that I had seen Mr. Stitt that morning, and was upon the question of those lands that I came to see him that morning, and stated to him the terms at which Mr. Stitt had placed them into my hands, and I asked him if he would give me their relative situation with regard to other points with which I was familiar. He took down a map which I think he called "the estate map," and gave me a general idea of their situation and locality. I then asked him the terms upon which Mr. Stitt received it from him, because Mr. Stitt claimed that he had given it to me upon the same terms as he had received it from him, subject to an arrangement between Mr. Stitt and myself, and I wished to have this confirmed at first hands. He stated to me that he gave them to Mr. Stitt for $40,000, subject to a

68 drawback of $2,500 upon the payment of the money, as commission to Mr. Stitt upon the sale. That I found to be just as Mr. Stitt had stated to me. I then stated to Mr. Huidekoper that I thought I had a reasonable prospect of making a sale, as I thought the price of the land very low; and he remarked, in general conversation, that they had sold land in that vicinity at $1.00, $1.25, $2, & $3, up to $4 an acre. I stated to him that Mr. Stitt's time must be nearly up. I judged that from something Mr. Stitt had said to me. Mr. Huidekoper said he supposed that was so, but they were disposed to give him a reasonable time to close the transaction. I think I asked him to define what he meant by reasonable time, and he just answered again in general terms that they would not be very particular with him, but of course they wanted it closed up as quickly as possible. That is the end of that particular conversation as far as I now recollect it. I have omitted to state that I asked Mr. Huidekoper at this conversation about

69 the making of a deed for the land spoken of. I, of course, wanted the deed made for a higher price than he was to receive. I think that I named $45,000 to him. I suggested the deposit of the deed at some banking-house in Philadelphia. He said he would not make a deed for $45,000, but would make a deed for $40,000 consideration, subject to Mr. Stitt's approval, or provided Mr. Stitt consented. This was all that occurred between us on the subject. After I returned to Philadelphia my partner, Mr. Griffith, took charge of this sale, and two or

three weeks after the time of the conversation with Mr. A. Huidekoper, Mr. Fred'k Huidekoper came to me in Philadelphia and stated that they were about removing the deed to New York—from Jay Cook & Co.'s, in Philadelphia, to New York—Mr. Stitt having made a sale, or *or* about making a sale of the land in New York some time before that, we having given up the papers to Mr. Stitt. We talked over the matter generally, but I don't remember any particulars. We talked
70 as old friends, but he observed that he thought Mr. Stitt was making a good sale, or a good deal of money out of it—or something of that kind.

Ex. "A." Question 5. Please look at the paper shown to you, marked Exhibit "A," and say what it is.

Answer. I look at it and say that it is the plot of lands referred to in the conversation spoken of in this my deposition. The lands to be sold, if my memory serves me correctly, are those marked on this map in light pink color.

Question 6. Do you know what, if any, exertions were made by Mr. Stitt to sell the lands after the conversation you had with Mr. Alfred Huidekoper?

Answer. I think, and I have every reason to believe, that he expended Exhibit "A." not only money but a good deal of time and labor in effecting a sale of the property described in Exhibit "A."

(Objected to by counsel for defendants as irrelevant, irre-
71 sponsive, and as not being testimony of any facts within the knowledge of witness.)

I had some correspondence with Mr. Stitt upon the subject, and came to New York once at his desire on this matter. I think it was after Mr. Griffith and I had given it up. I know that Mr. Stitt had some negotiations with Judge Casey on this subject, from conversation I have had with Judge Casey on the subject.

(Answer objected to as hearsay and irrelevant.)

72 Cross-examined by counsel for defendants:

Exhibit "A." X-ques. 1. Do you identify the Exhibit "A" as a paper that you ever saw before. If so, when and where did you see it?

Answer. I saw this map in Philadelphia. I think it was sent to me by mail or express from either Meadville or New York. My notion is, from New York, about the period of the conversation I had with Mr. Alfred Huidekoper. This is not the estate map which Mr. Huidekoper showed me.

X-ques. 2. Are there any marks on this paper by which you identify it as the map sent to you?

Answer. I think it is the identical map. I don't judge it by any particular marks, but by its general characteristics, by its general appearance, blots, lines, and marks. I know the map just as I distinguish the face of one man from another without being able to point out the difference.

73 X-ques. 3. When did you last see the map before to-day, and how long was it in your possession?

Answer. I can't say pos'tively, but I think we had the original three or four weeks, and had copies made of it; and the last time I saw it was, I think, in the fall or winter of 1864 and 1865.

X-ques. 4. Are you able to say positively whether this is the original map which you saw, or a copy of it?

Answer. I have every reason to believe it to be the original map. I prefer to answer in this shape, but of course there is a bare contingency of its being a copy.

X-ques. 5. In giving the conversation with Mr. Alfred Huidekoper, testified by you, do you undertake to give his precise words in whole or in part?

Answer. I do not pretend to give the identical language in full.

74 At least the part relating to terms and time is, I think, in Mr. Huidekoper's language.

X-ques. 6. How long was your conversation with him on this subject?

Answer. It all occurred in a few minutes. I was in a hurry. I suppose from five to fifteen minutes. The train to Philadelphia was about leaving, which I was to take.

X-ques. 7. Was there not between you and him something more said than you have testified to on this subject?

Answer. It is barely possible that more may have been said on this subject, but this being the part of the matter in which I was most interested, I remember this distinctly; there being nothing said, however, of a different character to what I have stated.

X-ques. 8. By what particular cir'umstance, if any, and how, do you fix the time of your conversation with Mr. Alfred Huidekoper?

75 Answer. I know that I was not at home that fall, except at the State and presidential elections. I generally stayed a week or two, but can't remember distinctly how long I stayed on those two occasions. I think I did not stay more than two weeks or less than one week, either time. At the time of the conversation I was just about returning to Philadelphia. Between my two visits I had returned to Philadelphia. The conversation was just before my return to Philadelphia, after one or the other of these two elections—I think the presidential. The main reason I think so is that a longer interval in my visits home had elapsed while we had this matter in hand, and that only happened after the presidential election. That is the only reason I have to think so. After the presidential election I think I did not return to Meadville until about the holidays.

X-ques. 9. Have you any means of fixing certainly the time of your conversation with Frederick Huidekoper?

76 Answer. No more than has been indicated.

X-ques. 10. In giving your conversation with Frederick, do you undertake to give the precise language used by him?

Answer. I do not.

X-ques. 11. May he not have said that "we," that is, the Huidekopers, were getting a good price, or making a good deal of money out of it?

Answer. I think not.

X-ques. 12. When, before to-day, was your attention particularly called to these two conversations; and by whom?

Answer. I think, in the late winter or early spring of 1865, I was informed by Mr. Stitt, and heard it from others of the trouble arising between Messrs. Huidekoper and Mr. Stitt. It may have been as late as March, but my impression is, it was in February; and my attention was, about this time, called to these conversations by Mr.

77 Stitt. Mr. Stitt and I have spoken of the matter two or three times since. We don't meet often. I don't think I have seen him more than three times since until the week before last.

X-ques. 13. Have you any connection with this case as counsel, or otherwise, or are you interested in its results?

Answer. I am not interested in its results at all. As attorney or counsel of record, he has occasionally asked my advice in general terms on the subject-matter, but not professionally; and I shall probably assist him in taking testimony.

J. C. MARCY.

The taking of further testimony in the foregoing-entitled cause in pursuance of the annexed agreement is now adjourned, at the request and by consent of the counsel for the plaintiff and for the defendants, until the 26th day of October, A. D. 1868, at 10 oclock a. m., in my office aforesaid.

CHARLES NETTLETON,
Commissioner.

78 NEW YORK CITY, NO. 111 BROADWAY,
October 27, *A. D.* 1868—10 *o'clock a. m.*

The taking of testimony in this cause is now resumed in pursuance of the foregoing adjournments, counsel for the plaintiff and for the defendants being in attendance.

JOSEPH MORSE, Jr., of lawful age, being by me first examined, cautioned, and solemnly sworn to testify the whole truth, deposeth and saith in answer to the following questions as follows:

Question 1. Where do you reside; and what is your business?

Answer. I reside in Williamsburg, Kings County, State of New York, and am a land-broker by occupation.

79 Quest. 2. Were you, in 1864 and 1865, interested in business in any way with Seth A. Backus; and in what business?

Answer. I was in the business of dealing in real estate, and mining claims, and property.

Quest. 3. Did you, in such business, become acquainted with William Stitt, the plaintiff?

Answer. I did.

Quest. 4. When?

Answer. I first saw Mr. Stitt, the plaintiff, on the morning of the 10th of January, A. D. 1865.

Quest. 5. State how, and what took place.

(Objected to as irrelevant and incompetent.)

Answer. I heard, on the day before, that Mr. Stitt was in the city of New York, with real estate to sell. I sent a party who knew him to get him to come to my office, for the purpose of making a trade with

80 him for land on Pit-Hole Creek, which, I understood, he had to sell. He came to see me at my office, No. 15 Broad street, New York City, on the morning of the 10th of January, 1865.

Ques. 6. Did he then produce to you a map?

Answer. Yes.

Exhibit "A." Quest. 7. Look at the paper *shown* now shown to you, marked Exhibit "A," and say whether that is the map.

Answer. That is the map. The colored lots tinted with pink on the map are those he said he had a right to sell.

(Answer objected to as incompetent, and irrelevant, and irresponsive.)

Quest. 8. What took place between you with reference to those lots?

(Objected to as irrelevant and incompetent.)

81 Answer. Backus and Morse entered into a contract for the purchase of those lands. After making the contract, but before paying any money, to satisfy ourselves more fully of his authority to sell, I went to Drake Bro's. Mr. Stitt had represented to us that they held a deed from the Messrs. Huidekoper to Mr. Stitt of those lands to be delivered at any time on the payment of forty thousand dollars. I went to Drake Brothers, and inquired if they held such a deed. I told them

the terms of our contract were to pay Mr. Stitt $10,000 down, and the balance of the sum due here in sixty days. I asked Drake Bros. if the deed would be delivered on payment of the balance according to my contract with Mr. Stitt. This conversation was had with Mr. William F. Drake, member of the firm of Drake Brothers. He said it would be. His instructions were to deliver the deed at any time upon payment of the $40,000; that the sixty days would make no difference to the Messrs. Huidekoper. He showed me the deed; it was all exe-

82 cuted, with the exception of attaching the stamps. The stamps were cancelled with the initials of the Messrs. Huidekoper, or one of them, and were ready to be affixed. Mr. Drake said he was instructed to affix them. The deed was executed by both the Messrs. Huidekoper. The deed described the lands shown on the map,

Exhibit "A." Exhibit "A," in pink color, and were the same lands, which I had contracted with Mr. Stitt to purchase. This interview with Drake was on the 14 of January, 1865, at the office of Drake Brothers, then at 23 William st., New York City, bankers. At the same interview I deposited with Drake Brothers $10,000 on the contract with Mr. Stitt. I had a receipt for the money indorsed on the back of the contract. I requested Mr. Drake to send to Messrs. Huidekoper, and get them to send a brief of the title to facilitate us in examining the title. They told me they would do so. On the last day of January, or the

83 first of February, 1865, I got notice from Messrs. Drake Brothers that they were instructed not to deliver the deed. A few days before that, they had sent me word that the brief of title had been sent in accordance with request. At the same time that the Drake Brothers informed me they had instructions not to deliver the deed, they also informed me that they had returned the brief of title. I think it was at the same time. I never saw the brief of title. On the 15 March, 1865, at two o'clock and five minutes in the afternoon, I went with Samuel Q. Brown, to whom the contract had been assigned, to the office of Drake Bro's, and made a tender of $62,000. We made the tender to William F. Drake. That was a trifle over the balance of the contract-price for the whole property with Stitt. Mr. Drake took the money, and examined it to see if it was all legal tender. He had before said he could not receive it, but he examined it to see if it was legal ten-

84 der at our request, and he made a minute on the margin of the contract of the amount tendered and the time. That was the end of that transaction.

Ques. 9. Was your contract with Mr. Stitt in writing?

Answer. It was.

Ques. 10. Where is that writing?

Answer. In the hands of Mr. Seth A. Backus, at Smithport, McKean County, Penn'a, I suppose. I left it with him in June last, and have not seen it since.

Ques. 11. Did you ever make a copy of that contract?

Answer. I did.

Ques. 12. Have you in your hands a copy of that contract which you made?

85 Answer. I have. I now produce such copy to be annexed to my deposition.

(Objected to as incompetent, the original not being produced, nor its loss or non-production duly accounted for.)

Exhibit "B." Answer resumed. Such a copy is hereto annexed marked Exhibit "B."

Cross-examined by counsel on behalf of defendants:

X-ques. 1. Are you one of the plaintiffs in a suit pending in the circuit court of the United States for the western district of Pennsylvania against the Messrs. Huidekoper and W'm Stitt, relating to these same lands?

Answer. I was one of the plaintiffs in such a suit. I understand the suit to have been withdrawn or discontinued.

86 X-ques. 2. Have you any interest of any kind in the result of the suit of Mr. Stitt against the Messrs. Huidekoper, or do you expect to receive any benefit in case he shall recover judgement?

Answer. I have no interest in the result of the suit, and do not expect to receive any benefit in case he should recover judgement.

X-ques. 3. Who, if any one, was present besides yourself and Mr. W'm F. Drake, at the time of your first interview with him, testified to by you?

Answer. William Stitt and Nathaniel F. Jones, now of Williamsport, Pennsylvania. There was no other person present.

X-ques. 4. What means have you, if any, of fixing the date of that interview?

Answer. The fact of the payment of the money at the time, and the date of the receipt on the paper. I also have a clear recollection of the date independ'tly of the papers. It was a matter in which I

87 felt a considerable interest at the time.

X-ques. 5. Do you remember what day of the week it was?

Answer. I do not.

X-ques. 6. Do you remember what time of day it was?

Answer. It was some time between 10 and 3 o'clock—the hour I cannot tell.

X-ques. 7. In giving your conversation with Mr. Drake at that interview do you undertake to give the precise words used by him?

Answer. With regard to the delivery of the deed on the payment of the balance I do, and perhaps as to all. I think I am not mistaken as to any of it.

X-ques. 8. Are you equally certain as to what was said with regard to sending for a brief of title?

88 Answer. I am.

X-ques. 9. Was the message received from Drake Bros. by you, that they were instructed not to deliver the deed, in writing or by letter?

Answer. I am not certain whether it was in writing, or whether I got it from Mr. Drake or from Mr. Stitt. I am not certain how I got it.

X-ques. 10. Have you any means of fixing the time when you received it?

Answer. I think I have at home. I think I have a copy of the telegram received by Drake Bros. from Messrs. Huidekoper. I think Drake Bros. must have sent me a copy of the telegram. I think that is the way I heard of it. I think I received it the day after the date of the telegram.

X-ques. 11. How did you recieve the message that Drake Bros. had received a brief of title as testified to by you?

89 Answer. I think Mr. Drake himself told me.

X-ques 12. How do you fix the time when you received that message?

Answer. I can't fix the exact time. I have nothing but my recollection.

X-ques. 13. Who was present at the time of the tender of $62,000,

testified to by you, besides yourself and Mr. Drake and Mr. Brown, if any one?

Answer There was no one else, unless Mr. Stitt was present, and I think he was not.

X-ques. 14. Whose money was it that was tendered?

Answer. Mr. Brown held the money in his hands, and I suppose it was his money.

X-ques. 15. Do you know where, and from whom he obtained that money?

Answer. I went with him to a bank on Wall street and saw the teller hand Mr. Brown a package of money which I suppose to be the
90 same money. I went direct with him from the bank to the office of Drake Bros. where the tender was made.

X-quest. 16. Did you or Mr. Backus furnish him with the money or any part of it to make the tender with?

Answer. No, sir; I asked him if he could make the tender himself without us, and he said he could without any inconvenience.

Re-'xamined by counsel on behalf of plaintiff:

Question. Had you still an interest in the contract, after the assignment to Mr. Brown?

Answer. We had.

Re-cross-examined by counsel for defendants:

91 Exhibit "A," Question. Please look at Exhibit "A" and say whether there are any marks upon it in your own handwriting or any particular marks by which you can now identify it as the same map shown you by Mr. Stitt, as testified to by you above?

Answer. The figuring in ink on the left hand upper corner on said map is in my own handwriting, the figuring in pencil on the right hand upper corner is in Mr. Brown's handwriting, made by him in my presence some time after my first interview with Mr. Stitt. I think I kept the map in my possession until the time of taking testimony in New York in the case of Backus & Morse against Huidekopers.

Quest. 2. Please look at the map and say whether you intend to be understood as testifying that the lots marked A, B, & C, in pencil on the left hand side are a part of the lots colored in pink?

Answer. I do. That was intended to be included by me as part
92 of the lots colored in pink. They were originally one lot, and while I had the map it was divided into three, as it now appears, and marked A, B, & C.

JOSEPH MORSE, JR.

OCTOBER 27, 1868. Adjourned until the 29 October, A. D. 1868.

JOSEPH MORSE, Jr., being recalled on this 6 day of November, A. D. 1868, and examined by plaintiff, further says, in answer to questions propounded to him, as follows:

Question. Examine and state what the paper now shown you is? (Objected to as incompetent.)

Answer. This is the original contract between Backus & Morse, and W'm Stitt, referred to in my previous deposition, with the indorsements thereon. The first indorsement is the receipt of Drake Brothers,
93 for the deposit of $10,000, dated January 14, 1865. The next is an assignment from Backus & Morse, to Samuel Q. Brown, dated January 14, 1865. The next is a minute in the handwriting of William

F. Drake. "March 15, 1865, 2.5 p. m., $62,000. D." The next is a re-assignment from Brown to Backus & Morse, dated September 11, 1865. There is an indorsement dated March 14, 1865.

(Testimony objected to as insufficient proof of the several writings referred to.)

Question. Will you annex these originals to your depositions?

Answer. I do not like to do—I am unwilling to do so, they being my private papers, of value. I produce and annex a true copy of these original writings, marked Exhibit "D."

Exhibit "D"

(Exhibit "D" objected to as evidence for want of proof of the execution of the originals, and on account of their non-production.)

94 Re-cross-examination by counsel on behalf of defendants:

Question. Why are you unwilling to part with the original paper produced by you?

Answer. There are other parties in interest in the original contract. We claim there are some monies due us yet directly from Drake Bro's, and perhaps from Huidekopers.

Question. You have stated, have you not, that you have no interest in this action?

Answer. I have so stated.

Question. Have you ever released or discharged Mr. Stitt from any liability that he may have incurred to you, or to Backus & Morse, on account of his failure to convey the lands in question to you?

Answer. I have not.

95 Question. Have you any prospect, or any expectation of ever recovering or receiving anything from Mr. Stitt on this account, unless he maintains the claim against the Huidekopers, sued for in this action?

(Objected to as immaterial, and irrelevant.)

Answer. I have no expectation of receiving anything from Mr. Stitt on this account, whether he maintains the action or fails in it.

JOSEPH MORSE, JR.

Said Joseph Morse, jr., on this 13th day of November, A. D. 1868, being again recalled and examined by, or on behalf of the plaintiff, further says in answer to the questions propounded to him, as follows:

96 Question. Did you know at the time of your contract with Stitt, and of your transactions with Drake Bro's, for whom Stitt was selling the lands; and if yea, did you know who were his principals?

(Question objected to as irrelevant and incompetent.)

Answer. I understood from Mr. Stitt, when he first came to me about the lands, that he was authorized to sell the lands for the Huidekopers.

JOSEPH MORSE, JR.

The taking of further testimony in the foregoing-entitled cause in pursuance of the annexed agreement is now adjourned, at the request and by consent of the counsel for the plaintiff and for the defendants, until the 29th day of October, A. D. 1868, at 10 o'clock a. m., at my said office, New York, October 27, 1868.

CHARLES NETTLETON,
Commissioner.

97 NEW YORK CITY, *October* 29, 1868—10 *o'clock a. m.*

The taking of testimony in this cause is now resumed in pursuance of the last-mentioned adjournment, counsel for the plaintiff and for the defendants being present.

WILLIAM F. DRAKE, of lawful age, being by me first examined, cautioned, and sol'mnly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and saith, in answer to the following questions, as follows:

Ques. 1. Where do you reside, and what is your business and place of business?

Answer. I reside at Yonkers, in the State of New York. I am a member of the firm of Drake Brothers, bankers and brokers. Our place of business is 16 Broad street, New York City.

Ques. 2. Do you know the plaintiff, W'm Stitt, and the Messrs.
98 Huidekoper, the defendants in this suit?

Answer. I do.

Ques. 3. How long have you known them?

Answer. I have known Mr. Stitt and Mr. F. W. Huidekoper since the fall of 1864. Mr. Alfred Huidekoper I have not known so long.

Ques. 4. What business relations have you and your firm held to the defendants?

Answer. We acted in 1864 as bankers and brokers for them, and have continued to do so since, and for some considerable time before 1864.

Ques. 5. Do you know anything of a transaction between them and the plaintiff respecting real estate; and, if so, state the same fully and particularly?

(Answer to be taken, subject to all legal objections as to the competency of the evidence.)

99 Answer. The first that I know about this is in finding an envelope, in our security-box, in which I found a deed—which deed I now produce. It is from Alfred Huidekoper and wife, and Alfred Huidekoper, executor of H. J. Huidekoper, and A. & F. W. Huidekoper as executors of E. Huidekoper, to William Stitt, dated 19 November, 1864; acknowledged 21 November, 1864; United States internal revenue stamps pinned on, cancelled with the initials "A. & F. W. H., 1864," with a map, on tracing cloth or paper, pasted on the blank page of said deed; which map was a map of the property described in the deed.

(The witness being asked by plaintiff's counsel if he will give up the deed and envelope to be annexed as part of his deposition, answered, "I have been notified by both parties not to give it up, and I hold it for my own security." I annex true copies of said deed and
100 the endorsement on the back of the same, and of the endorse-
Exhibits E & F. ment on the envelope marked Exhibits "E & F.")

Answer to ques. 5 resumed. The deed was in the envelope I now have here marked $40,000—deed of Huidekoper to Stitt—to be delivered to Stitt when he pays for it; allow Judge Casey to look at deed when he calls. I found this in the security-box, as I have before stated, and asked the clerks, What's this? Who is it from? Mr. Stephen H. Thayer, who was then one of our clerks, stated that Mr. Huidekoper had been there and handed this in with the instructions that were written upon it. I cannot give the exact date, but it was within a few days of the date of the deed. I then took out the deed from the envelope and looked it over. Nothing more was said at that time that I recollect. The next thing that occurred was, Mr. Stitt came in within a few days after and asked if there had been a deed left there by Mr.
101 Huidekoper. This was the first time I ever saw Mr. Stitt. I told Mr. Stttt there had been; and he asked to see it, and I showed it to him. He asked if I was authorized to deliver it to him, and I showed him the envelope and told him those were my instructions. He said he thought he would be able to take it in a few days. Mr. Stitt

was in and out of the office during the next few days after that, and during one of those visits, he stated he had sold the property. He said he had received a payment on account, or was about to receive a payment, and asked if we would receive it and hold it until the balance was paid. I said yes; and the money, $10,000 I think, was paid over to us next morning. Mr. Stitt had said that he had sold the property to Backus & Morse. The $10,000 was paid by Backus & Morse. Backus & Morse had before been in and seen the deed, and made the enquiry whether I was authorized to deliver it up upon payment of the
102 money. I said "Yes, sir." The receipt for the $10,000 paid by Backus & Morse was endorsed upon a contract made by Backus & Morse with Mr. Stitt. That paper was in the possession of Mr. Morse. The $10,000 was paid by Backus & Morse on the 14 January, 1865. I receipted for it in the name of my firm. Shortly after this I received a telegram from Messrs. Huidekoper, which I gave up to be annexed to my deposition in the case of Backus and Morse against Huidekopers and others, in May, 1866—the counsel for said Huidekopers consenting to such surrender. The telegram was dated the 24 January, 1865, and was as follows: "Consider Stitt's deed withdrawn, and subject to our further orders," signed "A. & F. W. Huidekoper." I received it right away on the day of its date. I also received a letter a few days after, dated 27th day January, 1865, or about that day, to the same effect as the telegram. Mr. Stitt and other parties came in and tendered me $40,000. He had previously given me notice not to
103 deliver up the deed to the Huidekopers. This notice was after I had received the telegram. I cannot fix the date of the tender of the money. It was a very short time after I had received the telegram. (On referring to a memorandum of his former testimony, witness says:) On the 27 day of January, 1865, Mr. Stitt demanded the deed of me, and at the time he demanded it he tendered to me the money. The amount tendered was $40,000.

OCTOBER 29, 1868.—The taking of further testimony in this cause is now, at the request and by the consent of counsel for the plaintiff and defendants, adjourned until the 4th day of November, A. D. 1868, at 10 o'clock a. m., at my said office.

CHARLES NETTLETON,
Commissioner.

104 NOVEMBER 7TH, 1868, No. 111 BROADWAY, N. Y.

The taking of the further testimony of the witness W'm F. Drake is now resumed, counsel for the plaintiff and defendants being in attendance.

Ques. 5. After the payment of the $10,000 and before the receipt of the telegram referred to, had you seen Mr. F. W. Huidekoper; and, if so, when and where had you seen him?

(Objected to as leading.)

Answer. I had seen him in our office, at No. 23 William street, about the 18th January, 1865.

Ques. 6. Did you have any conversation with F. W. Huidekoper at that time in reference to this matter; and, if yea, what was it?

Answer. I spoke to him about Mr. Stitt having sold the land. I asked him if he had heard of Mr. Stitt having sold the lands, referring to the lands in question. He said he had, and it was all right, but that
105 he was sorry that he had sold them, as he would be willing to

give nearly double what they had been sold for. I asked why they were so much more valuable, and his reply was, in consequence of large flowing wells having been struck near the property. It was at this interview that he gave me what he said was an abstract of the title of property which Mr. Stitt had sent for, and requested me to give it to Mr. Stitt when he called for it, so that he could close up the transaction.

Ques. 7. What did you do with the abstract left by Mr. Huidekoper?

Answer. At that time I put it in the safe with the deed, and subsequently I returned it to Mr. Huidekoper—to the firm of A. & F. W. Huidekoper—by mail, at their request—in pursuance of the request contained in a letter dated the 8th of February, 1865, hereto annexed, marked Exhibit "G," and which letter I received in due course of mail and answered on the 13th of February, 1865.

Exhibit "G."

106 (This letter witness consents to have annexed as an exhibit with the consent of Messrs. Huidekoper's counsel.)

Ques. 8. Did you have the brief of title referred to copied before you returned it; and, if yea, by whom?

Answer. As the matter was in controversy, I had it copied. It was copied by one of our clerks, Edward Halsted.

Ques. 9. Are you acquainted with the handwriting of Alfred Huidekoper?

Answer. I am.

Ques. 10. In whose handwriting was that original abstract?

(Question objected to by defendants' counsel, because witness has not shown himself competent to answer, and because the paper referred to is not produced.

107 (Counsel for plantiff gives defendants' counsel notice to produce before the commissioner the original abstract.

Which defendants' counsel declines to do, because he has received no previous notice and has not got it.

Plaintiff's counsel give defendants' counsel notice to produce it at the next hearing, if testimony is not closed this day.)

Answer. That I cannot say posit'vely. I stated in giving my evidence in a former deposition that I thought it was Frederick's handwriting, but I had not been long in the office and was not very familiar with their handwriting; but since then I have become more familiar with the handwriting of them both, and I now think it was not in the handwriting of Frederick but that it was in Alfred's.

Ques. 11. After the interview with Frederick W. Huidekoper, about the 18th of January, to which you have referred, did you have

108 any interview with Backus & Morse and Brown, or any of them; and, if yea, when and where, and what was said?

(Objected to by plaintiff's counsel as incompetent and irrelevant.)

Answer. There were interviews both previous and after; they were all at my office. Mr. Morse and others with him came in to inquire if I would deliver the deed, (and to see the deed.) He wished to know if I would deliver the deed upon the payment by Mr. Stitt of the $40,000. I said I would. I also showed him the deed. This conversation occurred before and also after Mr. F. W. Huidekoper came in. The only difference was Mr. Morse had different parties with him on these two occasions. I showed him the deed in both instances. At the interview, previous to my seeing F. W. Huidekoper, one of the parties asked me if I thought the Messrs. Huidekoper would have any objections to, or if they would deed the property directly to them, or to whom

109 they might direct, on the receipt of the money for the deed. I told them I did not know what the Messrs. Huidekoper would do as regards the matter. I would ask them, the first opportunity I had.

Ques. 12. When Mr. F. W. Huidekoper come to your office, about the 18 January, 1865, what did you say to him, if anything, in reference to this conversation with Morse and others, and what answer did he make?

Answer. I said to Mr. F. W. Huidekoper that I had been requested by the parties who had purchased the property to inquire or learn whether the property could be deeded directly to them. Mr. Huidekoper stated he thought there would be no difficulty about that, if Mr. Stitt wished it.

Ques. 13. Did you have an interview a second time with Morse and his associates after your interview with F. W. Huidekoper, to which you have referred? If yea, state what took place, and when and where.

110 (Objected to by defendants' counsel as incompetent and irrelevant.)

Answer. On March 15, 1865, I had such an interview with several of them. Mr. Morse was amongst the number at that interview. They tendered us $62,000 in legal-tender currency. They handed this package of money to me, and said there was $62,000, that was a little more than was due, but they wanted to be sure and have enough, and they asked me to count it, and at the same time demanded of me the deed. I refused to count it at first. They insisted on my doing so, and I did so, and found it $62,000, and I made a note of the amount and the time in the original contract.

Ques. 14. On what grounds did you decline to count the money and deliver the deed; and did you state the grounds to them; and if so, what did you say?

(Same objection as to the last pending question.)

111 Answer. I did. I stated that I declined on account of having received instructions from the Messrs. Huidekoper not to deliver the deed.

Ques. 15. Please look at the papers now shown to you, marked Exhibits "H, I, J, K, & L," hereto annexed, and state whether they are true copies of the telegram and letters you received from the Messrs. Huidekoper, and on which you based your refusal to deliver the deed.

(Answer taken subject to all legal objections to the competency of the orginals if they were produced, instead of these copies. These being admitted to be true copies of the originals which were annexed to the former deposition of the witness in the cause of Backus & Morse against Huidekoper's, and others in the circuit court of the United States for the western district of Penn'a, and the objection not being to them as copies.)

112 NOVEMBER 7TH, 1868.—The taking of further testimony in the cause is now adjourned until the 12th day of November, A. D. 1868, at 3 o'clock p. m., at the request and by consent of counsel for the plaintiff and for the defendants.

CHARLES NETTLETON,
Commissioner.

NOVEMBER 12, 1868, No. 111 BROADWAY, NEW YORK CITY.—The taking of further testimony in this cause is now resumed in pursuance

of the last mentioned adjournment, counsel for the plaintiff and for the defendants attending.

Ques. 16. Have you seen Alfred Huidekoper write, and do you know his handwriting?

Answer. I have, and do know his handwriting.

Ques. 17. Which of the parties has generally transacted the business with your house for A. & F. W. Huidekoper, and has Alfred Huidekoper recognized the acts of F. W. Huidekoper as binding upon them both?

113 (Defendants' counsel objects to the second part of the question as leading, and to the whole question as irrelevant and incompetent.)

Answer. F. W. Huidekoper transacted the most of their business with us, both by letter and in person, and Mr. Alfred Huidekoper has always recognized all the transactions which F. W. Huidekoper has had with our firm.

Ques. 18. Was there any other reason for your refusal to deliver the deed, except the telegram and letters referred to?

(Defendants' counsel objects to this question as irrelevant and incompetent.)

Answer. I don't know of any other reason. I had had notice from both Stitt and the Huidekopers not to deliver it up. The notice from Exhibit "M." Stitt, a copy of which, marked Exhibit "M," is hereto annexed, was received after his demand and tender of $40,000 and my refusal, but at the same interview. I had no other notice from 114 him. A copy of the notice from Stitt is hereto annexed, marked Exhibit .

Cross-examined by counsel on behalf of defendants:

X-ques. 1. Who constituted the firm of Drake Bro's in January, 1865?

Answer. James M. Drake, special partner, W. F. Drake and A. A. Drake, general partners.

X-ques. 2. How long had you then been a partner in the house?

Answer. From the April previous.

X-ques. 3. Before the April previous were you in the employ of the house?

Answer. Only a few weeks, except occasion'lly, when they were much pressed with business, I would go for a short time and help them. Then the firm was James M. Drake & Co.

115 X-ques. 4. What business transactions, and how many of them do you remember of A. & F. W. Huidekoper with the firm of Drake Bro's before January, 1865, except in relation to this deed. State the nature of the tranactions.

Answer. The nature of their transactions was in the purchase and sale of Government securities, collecting interest, and paying their drafts, and attending to anything they might direct in our line. The number of the transactions I do not recollect. They were never numerous; not what we call numerous.

X-ques. 5. Do you know of any purchase or sale of Governments for them before January, 1865? If so, how many such?

Answer. I know there were purchases, but I can't remember how many.

X-ques. 6. How was their business with Drake Bro's generally transacted; in person or by letter?

116 Answer. Generally by letter. When either of them were in town, they came into the office and directed what should be done.

X-ques. 7. Did your firm, before January, 1865, transact any other business for them except purchasing and selling Governments, collecting interest, and paying drafts, besides the matter of this deed?

Answer. I am under the impression that we subscribed at Washington for Governments for them, but I am not positive. It is so long ago, I don't remember anything else.

X-ques. 8. At what time and how were the original letters, of which copies are annexed, marked Exhibits "I," "J," "K," "L," and "M," received by you?

Exhibits "I, J, K. L, & M."

Answer. They were received by us by mail after their dates, except "L." Exhibit "L," which was, I think, handed to us by Mr. Pritchard, at our office. The letter, January 25, 1865, Exhibit "I," was received by us on the 27th January, 1865, in the afternoon. The other letters were received within a few days of their date.

117 X-ques. 9. To whose credit did you receive the $10,000 referred to in your direct examination?

Answer. We passed it on our books to the credit of Backus & Morse.

X-ques. 10. Your deposition was taken, was it not, in a case of Backus & Morse against the Huidekopers and others pending in the circuit court of the United States, at Pittsburgh, in May, 1866?

Answer. It was taken in a case between those parties, in May, 1866. I do not remember the court.

X-ques. 11. Did you, in that former deposition, testify as fully as you were then able, and could then recollect the facts in answer to the questions put to you?

Answer. I have no doubt I did.

X-ques. 12. Did you, in that deposition, testify, as fully as you could then recollect, to all of the conversation between yourself and

118 F. W. Huidekoper, as to which you have testified in this examination?

Answer. I usually answer questions as I recollect them at the time. I undoubtedly told all of that conversation which came to mind at that time.

X-ques. 13. Did you, in that former deposition say anything about Fred. W. Huidekoper having told you that oil had been struck near these lands?

Answer. I don't remember whether I said anything about that or not. We had a long conversation at the time about this and other things.

X-ques. 14. Do you not think that if you had then recollected such a remark of Mr. Huidekoper, you would have stated it?

Answer. I presume I should. Certainly had I been asked and had recollected it, I should.

X-ques. 15. Did you not, in your former deposition, refer to a

119 remark made by Mr. Alfred Huidekoper to you, in the July following, about oil being struck near these lands, and have you not confounded his remarks on that subject with Frederick's?

Answer. I can answer that very distinctly and positively. When Alfred made the remark, I remember that Frederick had made the same remark. I have not confounded the two.

X-ques. 16. Were not the inquiries made by Morse and others, as to whether the deed would be delivered upon payment of the money made at the time of the payment of the $10,000?

Answer. They were.

X-ques. 17. And also before; and if so, how many times?

Answer. Once, certain, and I think twice.

X-ques. 18. Are you sure, now, that they were also made after that payment?

120 Answer. Yes.

X-ques. 19. Did you not say, in your former deposition, that they were not made after that payment?

Answer. Not the way you apply it now, or if I did, I did not understand the question then as I understand it now, for I knew then, perfectly well, as I know now, that he did repeat the inquiry after.

X-ques. 20. Was it Mr. Stitt or Mr. Morse who asked whether you thought the Huidekopers would deed the land direct?

Answer. I don't think it was either. I think it was some party that Mr. Morse had with him.

X ques. 21. Have you, before testifying upon this examination, refreshed your recollection by reading over your former deposition, or a copy of it?

121 Answer. I have taken it in hand for the purpose of reading it, but have only read part of it.

X-ques. 22. Have you now any distinct recollection of the exact words, in whole or in part, used by yourself and Fred. W. Huidekoper in the conversation testified to by you, and independ'tly of the copy of your former deposition above referred to?

Answer. I don't think I have read my former deposition as to that conversation. I think I have made use, in my direct examination, of the exact words used by him and myself, so far as relates to this matter.

X-ques. 23. In your former deposition, did you not say that you thought the abstract of title was in the handwriting of F. W. Huidekoper?

Answer. I believe I did.

X-ques. 24. You believed it then to be in his handwriting, did you not?

122 Answer. I did, or I should not have said so.

X-ques. 25. What acquaintance had you then with his handwriting?

Answer. I had but very little to know that it was his. We had been receiving letters for some time from the firm, and I knew the handwriting of the parties, from the letters, before I had seen either of them write. Their handwriting was dissimilar, and I did not know which was which.

X-quest. 26. Why then did you in your former deposition say that you thought the abstract was in Frederick's handwriting?

Answer. From the fact that most everything that came to us from them came in that handwriting that I have learned since was F. W. Huidekoper's writing, having seen him write.

X-ques. 27. When do you first recollect being able to distin-

123 guish Frederick's from Alfred's handwriting?

Answer. I think some time in the spring of 1865, upon seeing Frederick write; I could then tell which was which.

X-ques. 28. When did you first suspect that you were wrong in supposing that the abstract was in Frederick's handwriting.

Answer. It was almost immediately after the deposition was taken.

X-ques. 29. What made you suspect it?

(Objected to as immaterial.)

Answer. I think something I heard in the office soon after my deposition was taken.

X-ques. 30. Have you not been told; and, if so, by whom, and where, that it was in Alfred's handwriting?

Answer. Yes; I have been told by my brother; I think by Mr. Thayer, and others.

124 X-ques. 31. Can you now recall to your mind, by your memory, unaided by what others have told you, the appearance of that abstract, so that you now can say that it was in Alfred Huidekoper's handwriting.

Answer. I have stated in my direct examination that I could not say it was in Alfred's handwriting; but it was not in F. W. Huidekoper's.

Re-examined by counsel on behalf of plaintiff:

Ques. 1. Have you, during all the time you have done business with and for A. & F. W. Huidekoper, followed the instructions of each and either of them?

(Objected to as leading and irrelevant and incompetent, and because the witness has been fully examined on the same point.)

Answer. Yes, sir; to the best of our ability and power.

125 Ques. 2. State whether or not, exclusive of the transaction in regard to this matter, either of them has ever denied the authority of the other to act for him, or repudiate to you the acts of the other.

(Same objection.)

Answer. Not that I am aware of.

Ques. 3. Go on and state what you commenced to say while answering one of the cross-interrogatories in reference to matters passing from your mind in consequence of being interrupted in your answers to give time to have them written out.

Answer. I was going to say that frequently, whilst an answer was being written, the exact words that were made use of at the time passed from my recollection at the time in consequence of suspending to have it written.

Recross-examined by counsel on behalf of the defendants:

126 Question. Did you ever make any written memorandum of the conversation with F. W. Huidekoper?

Answer. Not that I remember.

WILLIAM F. DRAKE.

12TH NOVEMBER, A. D. 1868. The taking of further depositions in this cause is now, by the request of counsel for the plaintiff, and for the defendants, adjourned until/ to-morrow, the 13th day of November, A. D. 1868, at 10 o'clock a. m., at my said office.

CHARLES NETTLETON,
Commissioner.

NOVEMBER 4, 1868, No. 111 BROADWAY, NEW YORK CITY.—The taking of further testimony in this cause is now resumed, in pur-
127 suance of the adjournment of the 29th October, A. D. 1868, counsel for the plaintiff and defendants being in attendance.

SIMEON E. CHURCH, of lawful age, being by me first examined, cautioned, and solemnly sworn to testify the whole truth, deposeth and saith as follows:

No question. I am an attorney and counsellor-at-law, and reside in the city, county, and State of New York. I know the plaintiff, W'm Stitt, and Alfred Huidekoper, one of the defendants, in this action. In 1864 and 1865 I was interested in the purchase of oil lands, in Venango County, State of Pennsylvania. I owned a tract on Stewart's Run in that county. I wished to purchase the adjoining tract which I recog-

Exhibit "A." nize on the map, Exhibit "A" hereto annexed, as the plot marked 168 acres, part of general tract "213," the part I already
128 owned being part of that general tract. I applied personally to Mr. Alfred Huidekoper sometime in the summer of 1864, at his office, in Meadville, Pennsylvania, as owner of the tract, to purchase of me the 160 acres in question, he shewed me the tract marked on a map kept in his office—his estate map—and we had some negotiations with reference to it at that time, but came to no conclusion. In December, A. D. 1864, I addressed a letter to him, from my office in New York, inquiring whether he still owned the lot, and whether it was for sale, and what were the terms. I received his reply about the 20th of December, 1864, signed A. & F. W. Huidekoper, which letter I now produce.

(Testimony and letter taken subject to objection as to its competency and the sufficiency of its proof.)

Exhibit "C." The letter is dated 19th Dec., 1864, and is hereto annexed, marked Exhibit "C." The letter was received by me in due
129 course of mail from Meadville, Pennsylvania, and answered the inquiry I had made to Alfred Huidekoper by letter, as this letter referred me to Mr. Stitt, as the party with whom to negotiate
Exhibit "A." with the tract. I sought out Mr. Stitt when he shewed me the map, Exhibit "A," and we had a negotiation about the land. As his price was higher than I had hoped to get it for from Mr. Huidekoper, nothing resulted.

(The foregoing evidence of negotiation with the plaintiff objected to as incompetent.)

Cross-examined by counsel for defendants:

I think I have not got a copy of my letter to Mr. Huidekoper. I have looked for it, and have not found it. What I have stated as the contents of it, is the whole substance of it. I was in the oil region in Penn'a nearly all the summer of 1864. I think it was in September or October, 1864, that I first saw Mr. Alfred Huidekoper in Mead-
130 ville. I returned to New York in October. It may have been earlier than September that I saw him there. I have no memorandum of the date of my letter to Mr. Huidekoper.

S. E. CHURCH.

The further taking of testimony adjourned until the 5th November, A. D. 1868, at 3 p. m.

CHARLES NETTLETON.

NOVEMBER 5TH, A. D. 1868—3 *o'clock p. m.*
No. 111 BROADWAY, NEW YORK.

The taking of further testimony in this cause in now resumed, counsel for the plaintiff and for defendants being in attendance.

SAMUEL Q. BROWN, of lawful age, being by me first examined, cautioned, and solemnly sworn to testify the whole truth, deposeth and saith, in answer to the following questions, as follows:

131 My name is Samuel Q. Brown. I reside at Pleasantville, Venango County, in the State of Pennsylvania, and am a merchant, doing business at Pleasantville aforesaid. I am acquainted with the parties, plaintiff and defendants, to this suit, William Stitt and Alfred and F. W. Huidekoper. In the years 1864 and 1865 I was engaged in the real-estate business in the oil districts in Pennsylvania.

Question 1. Were you interested in a contract for the purchase of oil

lands in Venango County, Pennsylvania, belonging to the Messrs. Huidekoper between Messrs. Backus & Morse, and the plaintiff William Stitt, in 1865? If so, state fully what you had to do with it.

(Question objected to as irrelevant and incompetent.)

Answer. My first recollection is that Mr. Morse, and I think another gentleman named Faber, came to my office in New York City, No. 8
132 Broad street, and shewed me a plot of several tracts of land in Venango County. He shewed me a map. Exhibit "A" being shown to witness, he says he could not say whether that is the map or not. The lands that he shewed me are represented on this map in pink colors. I could not tell the date of this exactly. I should think it was the fore part of January, 1865. In the first conversation we had, I think Mr. Morse asked me my opinion of the property. It resulted finally in my purchasing an interest in a contract for these lands between Mr. Stitt, Morse, and others. This was a few days—perhaps two or three days after my first conversation with Mr. Morse. My purchase was in writing. I think I had an assignment of a part interest in the contract. My recollection is one-fifth. I don't know where the assignment is. I don't know whether it was written on the back of the contract or on a seperate piece of paper. Very soon after I
133 had purchased an interest in the contract, some time about the middle of January, 1865, Mr. F. W. Huidekoper came into my office, No. 8 Broad street, New York City, and said he had certain oil lands in the Pit-Hole region, Penn'a, which he had authorized Mr. Stitt to sell, and he was then looking for Mr. Stitt to withdraw the lands from the market, if he had not sold them. Something was then said about these lands, where they where, and I told Mr. Huidekoper that I, in connection with some other parties, had bought them. I then asked him if it was all right, and he then said "I suppose so," or something like that, giving me to understand if they were sold according to agreement with Mr. Stitt, it was all right; that he had hoped to see Mr. Stitt before he had sold them, as they were then worth more than they were when they had arranged with Mr. Stitt, in consequence of the developments in the locality. I think there was something then passed about the amount paid down. I asked Mr. Huidekoper that, in case
134 we wanted to make a title direct to us, if he would have any objections. He said "no," if we paid the additional expenses, it would make no difference to them. That is about the import of the conversation on this subject. I was intimate with Mr. Huidekoper, and we talked about other things.

(The defendants' counsel objects to the foregoing evidence relating to a purchase of a part interest in a contract by the witness as incompetent and on account of the non-production of the contract and assignment.)

Ques. 2. The lands of which you are speaking *of* with Mr. Huidekoper were the same as those shown in pink in Exhibit "A," were they not?

Exhibit "A."

Answer. Yes.

Ques. 3. From the memoranda you have or otherwise, can you fix the date of this conversation? If not, state as nearly as you can.

135 Answer. As near as I can tell it was about the middle of January, 1865. I can't tell exactly. I should think it was two or three days after I had purchased the interest.

Ques. 4. Did you have anything to do with the payment of $10,000 in the Backus & Morse contract? If so, state what.

(Question objected to as irrelevant and incompetent.)

Answer. I paid $2,000 of that money. My impressions are that I paid it to Backus & Morse before the $10,000 was paid in. I could not now tell how long before, but my impressions are that it was on the same day that the $10,000 was paid. I think it was on the same day that the assignment was made. I think I had concluded to take an interest a day or two before.

Ques. 5. Did you pay the money on the day the assignment bears date?

(Objected to as leading.)

136 Question withdrawn.

Ques. 6. State the time of payment with reference to the date of the assignment.

(Objected to as incompetent and because it is an examination as to the contents of a written paper not produced.)

Answer. I think it was the same day the paper bore date; what I mean to say is that the same day I paid the money I took the assignment.

Ques. 7. State what next occurred in reference to this transaction.

(Objected to as irrelevant and incompetent.)

Answer. Afterwards we learned that the Messrs. Huidekoper objected to the sale; how long afterwards I could not say. It was a short time afterwards that I heard that Mr. Huidekoper had given Drake

137 Bros. some directions about it. I, accompanied by either Mr. Morse or Mr. Backus, went to the office of Drake Bros., in William street, I think within the time specified in the contract, and tendered to one of the firm of Drake Bros., the balance due on the contract—the Backus, Morse and Stitt contract—the contract I first referred to. I don't remember the exact amount I tendered; it was the full amount due on the contract, possibly a little more, but I am sure it was the full amount. It was in legal-tender currency. We demanded the deed and Drake Bros. said they had orders not to deliver it, and they did not deliver it.

Ques. 8. In your conversation with Mr. F. W. Huidekoper, which you have detailed, did you show him the contract between Backus, Morse & Stitt?

Answer. I don't remember having done so.

Ques. 9. Did you state to him anything respecting its terms? If so, what?

138 Answer. I think I did. I think I told him $10,000 was paid down, and, I think, I told him the balance would be paid as soon as the brief of title was ready. I simply give my impressions about it, not having recalled the subject to my mind for some length of time. I think I told him also the amount of sale.

Ques. 10. Were you largely interested in oil productions or oil lands at that time?

Answer. I was pretty largely interested in both.

Ques. 11. Have you a recollection now of the fact that a large well was struck in the vicinity of those lands at or about the time of this conversation which affected the value of these lands?

Answer. There was a large well struck in the neighborhood of a portion of these lands about the 8th January, 1865. My recollection

139 is that it was the 8th of January, 1865, from telegrams and letters received by me at that time. The well was reputed to yield from four hundred barrels to six hundred barrels per day.

(Objected to as incompetent, irrelevant, and hearsay.)

Cross-examined by counsel on behalf of defendants.

X-ques. 1. Had you a place of business in New York City, in January, 1865, and another in Pleasantville, Penn'a?

Answer. Yes, I had; and another in Rouseville, Pennsylvania.

X-ques. 2. Were you in New York during the whole of January, 1865? If not, what part?

Answer. I was here, I remember, on the 8th of January, 1865, because I know I received a telegram on the 9th; the day before was Sunday and I know I was here then. I don't remember when I left New York, but I may have gone out before the latter part of January.

140 X-ques. 3. What business were you doing at that time?

Answer. Buying and selling oil lands and oil stock.

X-ques. 4. Had you any conversation with F. W. Huidekoper at any other time during the same month except that referred to in your direct examination?

Answer. I don't now remember having any with F. W. Huidekoper. I think I met him a short time before. It may have been in January; it might have been in Meadville in December before, or it may have been at a hotel in New York, but I had no other conversation with him on this subject that I recollect.

X-ques. 5. Had you any business with him during that month?

Answer. Not that I recollect.

141 X-ques. 6. When before to-day was your attention specially called to this conversation with Mr. F. W. Huidekoper?

Answer. I think I repeated it to the parties interested at the time. After that when we found there was a dissatisfaction with the Huidekopers about the sale we talked about it. It has come up since in conversation, but I don't remember the date. Once they called on me to get me to make a memorandum of what I remembered about it. They said they were about to litigate it. I don't remember when it was, but I should think six months after the time.

X-ques. 7. In giving your conversation with Mr. Huidekoper are you able to give in whole or in part the precise words used?

Answer. I am not.

X-ques. 8. In giving your testimony about that conversation

142 have you refreshed your recollection with any writing? If so, when and by whom was that writing made?

Answer. The memorandum I made at the request of the parties as above referred to has been handed to me, and I refresh my recollection with that.

X-ques. 9. Independ'tly of that paper, have you any distinct recollection at this time of what passed in that conversation between you and F. W. Huidekoper?

Answer. I have.

X-ques. 10. What do you distinctly remember independ'tly of that paper?

Answer. That Mr. Huidekoper said he was looking for Mr. Stitt to withdraw the property referred to from the market; that I told him that I, in connection with other parties, had bought it, and also

143 the conversation as stated by me before as to the making of the deed to us direct. My recollection is also distinct as to my asking him if it was all right, and that I got an impression from him that if Mr. Stitt had sold according to agreement, that it was all right.

X-ques. 11. Is this all the conversation relating to this subject of which you have a distinct recollection independ'tly of that paper?

Answer. I have an impression that Mr. Huidekoper said he expected

to have to go to Washington to find Mr. Stitt, and that he was then on his way. I remember nothing else.

X-ques. 12. Do you say that the paper by which you have refreshed your recollection of that conversation is the memorandum you yourself made?

Answer. It is a copy, I suppose, of a pencil memorandum
144 which I made and handed my book-keeper to copy. It is in his handwriting, and from my knowledge of the contents of the original I believe it is a correct copy.

X-ques. 13. When did you last see the original memorandum?

Answer. I don't remember having seen it since I made it. I probably have it, but don't remember having seen it.

X-ques. 14. Are you not quite confident that at the time of that conversation you did not show to Mr. Huidekoper the original contract between Backus, Morse and Stitt?

Answer. I am not confident I did not show it to him; I don't remember whether I had it or not.

X-ques. 15. Have you any recollection of telling him anything more about its terms than you have already stated?

145 Answer. My impressions are that I told him the terms of the contract as I understood it.

(Answer objected to by defendants' counsel as not being responsive.)

X-ques. 16. Are you interested in a suit pending in the circuit court of the United States at Pittsburgh, brought by Backus & Morse against the Huidekopers and others to compel the conveyance of these same lands?

Answer. No, I am not.

X-ques. 17. Have you any interest in the result of this action?

Answer. Not any.

Re-examined by counsel on behalf of plaintiff:

146 Question. Do you mean to say that the conversation, as you have stated it on your direct examination, or any part of it, you do not remember independently of the paper, after having your recollection refreshed by the paper?

Answer. My former recollection taken with that paper, makes my deposition as I gave it. In other words it refreshes my memory.

NOVEMBER 5TH, 1868.

The taking of further testimony of Samuel Q. Brown is now, at the request and by consent of the counsel for the plaintiff and for the defendants, adjourned until to-morrow, the 6th day of November, 1868, at 3 o'clock p. m., at my said office.

CHARLES NETTLETON,
Commissioner.

147 NOVEMBER 6TH, 1868—3 p. m.

The examination of the witness Samuel Q. Brown, is now resumed, counsel for the plaintiff and for the defendants being in attendance.

Ques. 1. Is there any part of the conversation as you have given it with Mr. Huidekoper that you do not remember independ'tly of the paper?

Answer. I answer this question as I did the other. I can't change the answer. I don't know what influence that paper had on my memory,

because before I thought anything about it the paper was handed to me and I read it.

Ques. 2. Do you now remember the conversation as you have given it?

Answer. I do remember it as my memory is refreshed by the paper.

Ques. 3. You say that you got the impression from Mr. Huide-
148 koper that if Mr. Stitt had already sold according to agreement it was all right. How do you get that impression, and what agreement do you refer to?

(Objected to by defendants' counsel because the witness has already been fully examined and cross-examined on the same matter, and because the question assumes that the witness did refer to some agreement, and as leading and incompetent.)

Answer. I got the impression from the conversation with Mr. Huidekoper and understood he referred to the contract between Stitt and the Huidekopers.

Ques. 4. State what that conversation on that subject was, as nearly as you can recollect, and whether he stated what the contract was?

(Same objection as to last preceding question.)

Answer. As I said before I can't give the exact words used, but, as near as I can recollect, it was as I said before; he said he was look-
149 ing for Mr. Stitt to withdraw certain lands which he had in the Pit-Hole region from the market, if Mr. Stitt had not sold them. I understood Mr. Huidekoper to say that he had authorized Mr. Stitt to sell the lands and he was now looking for him to withdraw the lands from the market if he had not sold them.

Ques. 5. Look at the paper now shown you and state what it is?

Answer. I have seen the paper before; it is the original paper I have referred to as the contract between Backus & Morse and Mr. Stitt. The paper hereto annexed, marked Exhibit "D," is a true copy of that contract, with the endorsements thereon. I cannot annex the original as it does not belong to me.

Exhibit "D."

(The introduction of the last exhibit in evidence objected to for insufficiency of proof of the original, and on account of the non-production of the original.)

150 Re-cross-examined by counsel on behalf of defendants:

Question. Have you given in the foregoing deposition, all that you can now recall of the conversation between you and Mr. F. W. Huidekoper relating to this land or the sale of it?

Answer. I think I have.

SAMUEL Q. BROWN.

Adjourned by request of counsel until 7 November, A. D. 1868, at 3 p. m., at my said office.

CHARLES NETTLETON,
Commissioner.

13TH NOVEMBER, 1868.—The taking of further testimony resumed, &c., &c.

151 LOUIS GERNER, of lawful age, being by me first examined, cautioned, and solemnly sworn to testify the whole truth, deposeth and saith, in answer to the following questions, as follows:

Question. What is your name, age, residence, business, and place of business, and what and where was your business and place of business in 1864 & 1865?

Answer. My name is Louis Gerner; am about 36 years old, and reside at 86 Second avenue, in the city of New York; and my business is at 38 Broad street, New York, as banker and broker. In the winter of 1864–1865 I was cashier of Drake Brothers, 18 William street, New York.

"E" and "F." Ques. Look at the deed now shown to you, a copy of which is hereto annexed, marked Exhibit "E," and also at the envelope inclosing the same, a copy of which envelope is also attached to the deposition of W'm F. Drake, marked Exhibit "F," and say

152 if you ever saw them before; and if so, when and where?

Answer. I look at the deed and envelope, and say I saw this deed first at Drake Bro's office, and I received it from Mr. Huidekoper somewhere about noon: I can't remember the day or the month. It was in the fall or winter of 1864. I believe I put it into this envelope at that time and place.

Ques. In whose hands was said deed when you first saw it, and what was done with it by the party so having it?

Answer. That deed was, when I first saw it, in the hands of the younger Mr. Huidekoper. I know both the Huidekoper's, and it was the younger one. He gave it to me.

Question. For what purpose was it given to you, and what instructions did Mr. Huidekoper give you with reference to it, if any?

153 Answer. He handed this deed to me as cashier of Drake Bro's, who at that time were absent from the office, and instructed me to allow Judge Casey to look at it whenever he should call, and desired to do so; and also to tell Mr. Drake that the deed should be delivered to Mr. Stitt, and the stamps fully cancelled, on payment of the consideration-money.

Ques. What did you do with the deed, and what instructions, if any, did you give to the party to whom you first handed it, and when?

(Question objected to by defendants' counsel as irrelevant and incompetent:)

Answer. I handed the deed shortly afterwards, in the afternoon, to Mr. Thayer, who had charge of the security-box, and dictated to him the instructions which now appear on the envelope, and asked him to put the deed in the pocket-book for safe keeping, and he wrote the instructions on the envelope as they now appear at that time.

154 Question. What was said during the interview with Huidekoper, if anything, about the consideration, besides what you have already stated?

Answer. There was nothing else said, except that when he told me the deed would be delivered on the payment, I opened the deed and looked at the amount of the consideration-money, and I said $40,000; and he replied, yes, $40,000? That was all, I think.

Question. Do you know who wrote these endorsements on the back of the envelope; and if so, state?

Answer. This endorsement is in the handwriting of Mr. Thayer, made by him shortly after I had received the deed from Mr. Huidekoper, at the office of Drake Bro's.

Ques. Where have that deed and envelope been, since, as far as you know?

Answer. As far as I know, it has been in the pocket-book, and with Drake Bro's.

155 Cross-examined by counsel for defendants:

Ques. How long had you been with Drake Bro's at the time this deed was left, and when did you leave their employ?

Answer. I was with Drake Bro's, who are the successors of James M. Drake & Co., in whose employ I was at the time, from their commencement in the spring of 1864, until the first of May, 1865, and then I went into the firm of Stout, Thayer & Co., bankers & brokers.

Ques. Whose duty was it, in the absence of the Messrs. Drake, to receive such papers as this deed, if left at the office?

Answer. This was an exceptional case, because we were not in the habit of receiving papers of this nature.

Ques. Do you remember any reason why you did not yourself mark and put away the deed, and why you gave it to Mr. Thayer?

156 Answer. I was standing at the cashier's desk when I received the deed, and was busy, and Mr. Thayer's desk was right opposite me, and he having the security-box on his desk, I handed it over to him asking him to put the instructions on the envelope, and put it away in the pocket-book, which was in the box.

Question. Did you stand by him and look on while he was writing on the envelope, or did you return immediately to your own desk leaving him to write it?

Answer. I did not leave my desk, because Mr. Thayer was within my reach, right at my left, within two or three feet of me, and I just handed it over to him. I did not look on while he was writing but went on with my business.

Question. When did you first see and read the endorsement on the envelope?

157 Answer. I believe I saw it first in Drake's office after I had left, at the request of the older Mr. Huidekoper, who came to my office, and requested me to step into Drake's office to look at it, which I did, with him.

Ques. When Mr. Huidekoper first asked you about it did you recollect who made the endorsement on the envelope?

Answer. I believe I did not remember at the time.

Ques. Before you went with him to look at it, did you distinctly remember the instructions given you by the younger Mr. Huidekoper?

Answer. I remember the instructions but not distinctly, because I had forgotten the name of Judge Casey.

Ques. Did you remember the amount of the consideration?

Answer. I believe I did.

158 Ques. How were the stamps, if at all, attached to the deed when you received it?

Answer. The stamps were pinned to the deed.

Question. At the time Mr. Huidekoper left the deed did he have any conversation with you on any other subject; and how long was he there?

Answer. I think not; but very little, if any. He was there about five minutes, I should say.

Ques. How long was it after he left the deed before you handed it to Mr. Thayer?

Answer. It may have been a quarter or half an hour, or perhaps not more than five minutes, because I put it into my drawer when Mr. Huidekoper left the office.

Ques. Did you not give your testimony upon deposition in a

159 former case between Backus & Morse and the Huidekopers in relation to this deed and the instructions given to you about it?

Answer. I did, about two years ago, but I don't remember the parties except Huidekopers.

Ques. Have you, before testifying upon this examination, read over or had read over to you your former deposition, or a copy of it?

Answer. I have seen a copy of it and commenced reading it, but did not read it over because I remembered all about it. I did not read over more than the first three interrogatories and answers.

Ques. Before giving your former deposition did you not talk over with Mr. Thayer and others, the matter of the instructions of Mr. Huidekoper?

Answer. I really do not remember.

160 Ques. Did you state to the elder Mr. Huidekopor at the time that you went with him to Drake's office to see the envelope, all that you then remembered about the instructions given by the younger Mr. Huidekoper?

Answer. We went over to look at the deed, and the instructions were written on the envelope; that is all I could remember or state.

Ques. Were you not very busy about other matters at the time of day when the deed was handed to you?

Answer. I was busy just like any other day.

Question. Do you think you can remember at this length of time the exact words used in a conversation three or four years ago, and do you testify in this deposition to the exact words of the younger Mr. Huidekoper used in that conversation with him?

Answer. I think I can remember what Mr. Huidekoper said,

161 but the exact words I did not put down on paper so as to be positive.

Ques. Have you not given rather the substance of what was said in that conversation than the exact words?

Answer. I have given the substance and I think about the exact words also.

LOUIS GERNER.

13 NOVEMBER, 1 *o'clock, p. m.*—Adjourned until 3 p. m this day.

3 O'CLOCK p. m.—Testimony resumed in presence of counsel.

162 STEPHEN H. THAYER, of lawful age, being by me first examined, cautioned, and solemnly sworn to testify the whole truth, deposeth and saith, in answer to the following questions, as follows:

Ques. 1 What is your name, age, residence, business, and place of business; and what and where was your business in January, 1865?

Answer. My name is Stephen H. Thayer. I am twenty-eight years of age; reside in Tarrytown, New York. I am a broker and banker of the firm of Stout, Thayer & Co, and my place of business is 38 Broad st., New York. In 1865 I was stock delivery clerk with Drake Bro's, No. 23 William street, and had charge of their security-box.

Ques. 2. Please look at the envelope containing a deed purporting to be from Huidekoper to Stitt, now shown to you, copies of which deed and endorsement on the envelope are annexed to the deposition

163 of William F. Drake in this action and marked Exhibit "E," & "F,"

Exhibit "E" & "F" and state whether you saw said envelope before; and if yea, when first and where; and in whose hand writing is the endorsement upon such envelope?

(Objected to as incompetent and irrelevant.)

Answer. I look upon the envelope and say I have seen it before. I first saw it at Drake Bro's office, when I was clerk with them. I am unable to give the date. It was a matter of so little consequence to me at the time it occurred that I cannot tell the time. The endorsement upon the envelope is in my handwriting.

Ques. 3. From whom did you receive that envelope, and at whose re-

quest was the endorsement written, and what did the person from whom you received the envelope say to you at the time you received it?

(Same objection as to the preceding interrogatory.)

164 Answer. I received it from Mr. Gerner, and I wrote the endorsement upon it as it now appears, according to his instructions, acting merely as an amanuensis.

Ques. 4. State whether or not the envelope contained anything at the time you endorsed it; and if you say it contained a paper, please state what size and shape the enclosure seemed to have?

(Same objection as to the last question.)

Answer. I wrote, I believe, upon the envelope before the deed or paper was placed in it, and placed the paper in it as it was folded up without looking at it. It was a paper folded up, and about fitted that envelope.

Ques. 5. Look at the deed above referred to in the 2nd interrogatory to you, and state whether it seems to be the same paper you put in the envelope?

(Same objection as to the last question, and also that it is leading.)

165 Answer. It has the appearance of being the same paper.

Cross-examined by counsel on behalf of defendants:

X-ques. 1. When did you leave Drake Bro's?

Answer. On the 1st May, 1865.

X-quest. 2. Was not this indorsement made by you at a busy time of day, and in the midst of other matters of business?

Answer. I don't remember the time of day I made the endorsement. We were always busy there more or less.

X-ques. 3. When next, after you wrote this endorsement, did you see it?

Answer. I placed it in the security-box, and I don't call to mind now having anything in particular to do with it after that.

166 X-ques. 4. When was the first time, after you wrote the endorsement, that you can now recollect having your attention particularly called to it or reading it.

Answer. I think the first time I read it was when my deposition was taken before about two years ago. I don't remember having my attention called to it while it was in the security-box, yet it might have been.

Ques. 4. Was the former deposition to which you refer, taken in the case of Backus & Morse against the Huidekopers?

Answer. Yes, sir; it was.

X-ques. 5. Have you now any distinct recollection whether the paper enclosed, was in the envelope when the envelope was handed to you, or whether you took an envelope from your desk and put the paper in?

167 Answer. My impression is that I wrote on the envelope before putting the paper in. I am pretty certain that I put it in.

X-ques. 6. Have you any recollection of Mr. Gerner asking you to put the paper in an envelope?

Answer. I took the envelope out of a drawer according to his instructions, and wrote upon it whatever he dictated to me. I have the impression that he asked me to put it in an envelope.

X-ques. 7. Do you remember Mr. F. W. Huidekoper being at the office that day?

Answer. I think one of the Huidekopers was there that day, but do not know them 'part.

X-ques. 8. Have you not, at some time, been in doubt whether the paper was handed to you by Mr. Gerner, or one of the Messrs. Drake?

Answer. Mr. Huidekoper (the elder one) called at our office and
168 spoke to me about it some time after May 1, 1865, and I think I could not definitely state to him then, whether it was Mr. Gerner or Mr. Drake.

NOVEMBER 13, 1868.—Adjourned, by consent, to Nov. 14, 1868, at 10 a. m.

NOVEMBER 14, 1868, 10 *o'clock, a. m.*—Testimony resumed.

X-ques. 9. What cleared up your recollection on this point?

Answer. Upon thinking the matter over I remember Mr. Gerner coming round to my desk and giving me instructions.

X-ques. 10. How far was Mr. Gerner's desk from yours?

Answer. Just across the width of one desk—a very short distance—five feet about.

X-ques. 11. When Mr. Huidekoper, the elder, called upon you, had you had any recollection of receiving the paper and endorsing
169 the envelope?

Answer. I remember the circumstance of endorsing the envelope.

X-ques. 12. Do you remember the circumstance of your receiving the paper and putting it in the envelope?

Answer. When he first spoke to me, I did not have a clear recollection of the matter.

X-ques. 13. Did you not state in your former deposition, that you did not remember ever seeing the deed before your examination in that case?

Answer. I think I did not state that I did not see the paper before. I did not examine the deed at the time I took it.

X-ques. 14. Are you able now to identify the paper here shown you as being the same that you received from Mr. Gerner?

170 Answer. It has the appearance of being the same. That is the only means I have of identifying it.

X-ques. 15. Are there any marks upon it by which you identify it?

Answer. The names are there, I think the same, so far as I looked at it casually.

X-ques. 16. Do you swear that you looked at the names at the time so as to know what they were?

Answer. I did not look at them particularly; but I saw the names of Huidekoper there, and I saw two or three names.

X-ques. 17. Have you any recollection about the instructions given you, except that you wrote on the envelope what Mr. Gerner instructed you to write?

Answer. What I wrote was merely mechanical. I don't suppose I could have told five minutes after what I wrote.

171 X-ques. 18. In giving your former deposition you told all that you then remembered about this transaction so far as you [were] inquired of, did you not?

Answer. I did.

S. H. THAYER.

Adjourned to 16 November, 1868.

Then, EDWARD L. HALSTED, sworn.

Ques. 1. What is your age, name, residence, business, and place of business; and what was your business and place of business in 1865?

Answer. My name is Edward L. Halsted. I am 28 years of age; and am engaged in the insurance business, at No. 92 Broadway, New York City. I reside in the city of Brooklyn, State of New York. I
172 was clerk for Drake Bro's, No. 23 William street, New York, from about the 8th January, 1865, to about the first day of May, 1865.

"N." Ques. 2. Look upon the paper now shown you, an annex to your deposition, and marked Exhibit "N," and state in whose handwriting it is; and if in yours, state when and where and from what, and whose request you wrote it.

(Question objected to as incompetent and irrelevant.)

Answer. It is in my handwriting. I wrote while I was at Drake Bro's, as above stated, and at their office. I wrote it from another paper handed me to be copied. I think it was William F. Drake who handed it to me.

Ques. 3. State whether or no it is a true copy of the paper handed you by William F. Drake.

Answer. It is a true copy, to the best of my knowledge and belief.

173 Ques. 4. Were you at that time in the habit of copying papers that required accuracy in the copy?

(Objected to as immaterial and irrelevant.)

Answer. I was.

"N." Ques. 5. Look at the date and signature at the bottom of Exhibit "N," and state whether they are true copies of the date and signature on the paper from which you made the copy.

Answer. They are.

Cross-examined by counsel on behalf of defendants:

X-ques. Have you any recollection of comparing the copy with the original after writing the copy?

174 Answer. In this particular case I can't say either yes or no; but I was always in the habit of comparing the copies I copied; sometimes with the eye; sometimes by having somebody read one while I followed the other.

X-ques. 2. Did you take any more particular pains in copying the signature and date, or in making sure of their being correctly copied than you did in copying the rest of the paper?

Answer. No, sir.

X-ques. 3. What were your duties at Drake Bro's?

Answer. Assistant book-keeper.

X-ques. 4. Have you ever done business as clerk or copyist?

Answer. As assistant book-keeper I was clerk. I have never been exclusively employed as a copyist. I have copied occasionally.

Re-examined by counsel on behalf of plaintiff:

175 Ques. 1. What instructions, if any, did you receive in regard
"N." to the copying this paper, Exhibit "N?"

(Objected to as immaterial and irrelevant.)

Answer. Mr. Drake told me to be particular, as it was an important paper, or words to that effect.

Ques. 2. Were you particular?

(The same objection, and also leading.)

Answer. I was.

ED. L. HALSTED.

(Here follows certificate.)

176 STITT
vs.
HUIDEKOPERS.

Plaintiff offers to prove by the witness, to be followed by Joseph Morse and Seth A. Backus, all the parties to the contract, that when the contract was drawn, it was the intention and agreement of the parties to provide in the contract that the purchase-money should be paid as soon as the titles could reasonably be examined, and that it was a mutual mistake that the language of the contract was not made to express that understanding, and that the omission in the contract of such words as were necessary to clearly express that conclusion was a mutual mistake, such as ought to be corrected.

May 11, 1871. Offer overruled and pl'ff excepts.

W. STRONG, *J.* [L. S.]

(Indorsed:) Offer. May 11, 1871.

177 STITT
vs.
HUIDEKOPER.

Plaintiff offers to prove by witness, to be followed by other witnesses on the same subject, that when Venango County oil-lands were sold in the city of Philadelphia or New York, during the winter of 1864 & '5, it ordinarily required from thirty to sixty days to have a thorough professional examination of titles and liens made, when there were several titles to be examined, and that when any provision was made about the time for the examination of titles, that sixty days would not be an unreasonable period of time, taking into account the state and condition of the offices in which the records of titles and liens were kept and the amount of business in the hands of responsible and competent attorneys in the oil regions and other difficulties attending the examination of titles.

May 11, 1871. Offer overruled. Pl'ff excepts.

W. STRONG, *J.* [L. S.]

(Indorsed:) Offer & exception. May 11, 1871.

178 STITT
vs.
HUIDEKOPER.

Plaintiffs having offered the copy of the abstract of title, dated January 16, 1865, as proven by the plaintiff, defendants object to the admission of copy, and offer to produce, under pl'ff's notice, what defendants allege to be the original, and thereupon produce the same. The plaintiffs deny that the paper produced is the original, and propose to prove by W'm Stitt, that the said paper is not the original.

To which offer the def'ts' counsel objects that the original produced on notice is the best and only evidence, and that it is not competent to the plaintiff to refuse it on his own allegation that it is not the original; and, therefore, in its presence, and upon the footing of error, denied to introduce secondary evidence of the paper in question.

The defendants being in court and ready to be examined to prove that the paper produced is the original, and the plaintiff declining to examine them, the offer is overruled, and plff's exception noted.

W. STRONG, *J.* [L. S.]

(Indorsed:) Offer & exception.

179 STITT *vs.* HUIDEKOPER.

Pl'ff offers to prove by the witness that, at the time the contract of 10th Jan'y 1864, was made and signed by the parties, that Backus and Morse, the purchasers claimed that they would reasonably require sixty days' time within which to examine the lands and the titles, owing to the distance from New York to Venango County, Penn'a, and the difficulty of having searches and examinations made by competent attorneys in Pennsylvania, on account of the great number of real-estate transactions in the oil regions, and that the sixty days' time allowed in the contract was a reasonable provision under the circumstances of the case, and that the plaintiff consented to that provision in the contract for the purpose of allowing the purchasers to examine the lands and to procure professional examination of the titles to be made; and also to prove that, according to the usual course of business in that behalf, at that time, and under similar circumstances, the time given in said contract was reasonable; that it ordinarily required from thirty to sixty days to examine titles in Venango County at that time, to be followed by several other witnesses on the same subject, some of whom are lawyers and professionally familiar with the situation at the time.

May 11, 1871. Offer overruled and pl'ff excepts.

W. STRONG, *J.* [L. S.]

(Indorsed:) Offer & exception.

180 STITT *vs.* HUIDEKOPERS. Offer.

Plaintiff offers contract between W'm Stitt, the plaintiff, and Seth A. Backus and Joseph Morse, dated 10th January, 1865, for sale of lands designated on map in evidence, and described in deed dated November 19, and acknowledged November 21, 1864, for the following purposes:

1st. To show that, in pursuance of the arrangement between plaintiff and defendants, which rested partly in parol and partly in writing, (vide deed,) the plaintiff had made a bona-fide sale of the lands in question to reasonable parties before the defendants recalled from their own agents, Drake Bro's, the deed which defendants had placed in their hands in order to the plaintiff with authority and power to deal with strangers about said lands, and sell the same, to be followed by proof that both of the defendants consented to and approved in words of said sale, after the same had been made, and that, in pursuance of the said agreement between the plaintiff and Backus and Morse,

181 the said Backus & Morse elected to take the whole of the lands at the price mentioned in the said contract, and paid thereon to Drake Bro's, the agents of defendants, on the 14th day of January, 1865, and that the plaintiff, on that day, in the city of New York, mailed to the defendants a letter notifying them of the sale of the said lands to the said Backus and Morse, and that the same would be consummated as soon as the said Backus and Morse could ascertain that the title to the said lands was perfect, and requiring them to furnish to the plaintiff an abstract of their title for the use of the purchasers; and that, in pursuance of said notification from the said plaintiff, the said defendants, by Alfred Huidekoper, acting as their attorney,

and on their behalf, in his own handwriting, under date of January 16, 1865, furnished to the plaintiff for the use of the purchasers of the lands, an abstract of their title, which abstract of title arrived at Drake Bro's on the 18th January, 1865, and that both the defendants expressed themselves satisfied with the sale to their agents and some of
182 the purchasers; and that, on the 24th day of January, 1865, in consequence of new oil developements in the neighborhood of the lands in question, the defendants became satisfied that they could make more money by withdrawing the deed from Drake Bro's, and refusing to consummate the sale made by Stitt to Brackus and Morse, and by selling the lands to other parties; and that, therefore, and for that reason, they fraudulently refused to carry out in good faith their distinct understanding with the plaintiff.

2d. And, also, because the defendants elected, instead of giving to the plaintiff a written authority in the form of a letter of attorney to sell said lands, to give him a parol authority, and clothe him with credit to deal with strangers by making to him said deed, and depositing the same with their own agents, with instructions to show the same to parties dealing with him in relation to the lands, and thereby making him the channel through which the title must pass from the defendants to purchasers, rendering it necessary for him in order to make a valid sale of the said lands, to contract with the purchasers in his
183 own name; and that it was a fraud on the part of the defendants to induce plaintiff to rely upon their device in relation to his authority to sell said lands, and afterwards to defeat the same because they thought it was a bad bargain, and thought they could make more money by breaking it than by performing it.

3rd. And also to be followed by proof that the time allowed the purchaser by the terms of the said contract of 10th January, 1865, was a provision for the examination of the lands and titles, and that the time was reasonable under all the circumstances of the case, and the situation of the parties and the lands, and that the purchasers were entitled to a reasonable time to examine the lands and titles, and that the time allowed the purchasers in this case was not unreasonable, owing to the difficulty of making searches and procuring their services of competent attorneys who were familiar with the titles to be examined.

4th. Also, that it was usual, at that time, and in relation to that class of transactions, to allow ample time for the examination of the lands and titles, and that the time usually allowed exceeded sixty days.

184 5th. And to be followed by proof that the said defendants, by oral statements, letters, and said deed, as well as by their acts, represented to the public that the plaintiff was their agent, and authorized to sell said lands, and that it was a fraud on their part to refuse to recognize his acts done in pursuance of said authority.

6th. Because the said contract is a part of the res-gestæ.

(Indorsed:) Offer.

185 *Notes of testimony by Justice Strong.*

WILLIAM STITT *vs.* A. & F. W. HUIDEKOPER. } May 9th, 1871. Jury sworn.

WM. STITT, sworn.

I reside in Westfield, N. J. In 1864 & 1865 I resided in Meadville, Penn'a. In summer of 1864 was dealing in real estate, principally oil

lands. In latter part of August was upon head waters of Cherry Run; discovered H. owned a small tract or two, 60 or 70 acres. I thought by looks of land I might make something out of them. Next day, or day but one, I went back to Meadville and asked if land was for sale. They said they were not; they had given the refusal to another man. I then turned to go from office. One of the Huidekopers said they had several tracts of land in Allegheny Township, Venango County. They took down a map and commenced to show me the location of property. I called in once or twice. They said they would like me to undertake the
186 sale of these lands for them. They were both present. They said they were on the waters of Little Pit-Hole Creek. They figured up the amount and said there was about twelve hundred (1,200) acres in all—that would amount to about $36,000. They said if I would undertake the sale of these lands at $30 per acre, they would give me $2,500 for my trouble. Mr. A. Huidekoper said he would make out a map of the lands and give it to me, or send it to me. I said to him, if I could sell for more than $36,000.00 I supposed I could have the excess. He said it was not likely I could sell for more. I had better try for the $2,500, and not run the risk, but if I did get any more he had no objection, so that he got $30 per acre. We parted, and next day I found a map of the land on tissue paper. On the margin was written, I had the right to sell these lands at $30 an acre for 30 days. I have not that paper. I gave the map in a week or ten days to Jared C. Marcy. I have not seen it since. When I applied to him for it he referred me to Sam'l Griffith, of Mercer County. I wrote to him for it and he answered that he could not find it. After I got the map I looked up parties to buy. Through Marcy was introduced to a couple of Chicago men, at *McElheny*
187 House in Meadville. They agreed to go with me and look at lands. Took railroad to Oil City, and hired horses and rode fifteen miles. I had never seen the lands. I went to James Black, & he referred me to his son. I hired him to go with us and show us the land. We were over two days; after making examination returned to Meadville. They told me if I would go with them to Chicago, they could get up a company to purchase. Went to Chicago—staid 4 or 5 days—talked with me about it; some talked of raising a party, & proposed to go to Cairo, Ill. We went to Cairo, staid one day, & went to St. Louis to make up a party of army officers; staid two days and one night. They gave up making purchase and I returned home to Meadville. Then came across this Mr. Marcy; told him I had failed making up a party. He said he was going to Philadelphia. I gave him the map to sell them. He said he would write or telegraph if he could do anything. I waited ten or twelve days. I got a dispatch, stating he thought he could sell the lands. I showed the dispatch to Mr. Huidekoper—this was drawing toward close of Sept. and the thirty days about out. He said that made no difference, so I accomplished the sale—as to time. A few
188 days after I got a letter from Mr. Marcy, which I showed to Huidekoper. It run along till latter part of Oct. Marcy came home and told me his prospects of selling the land; showed me a letter from Joseph Casey at N. Y. A few days after Marcy met me or came to my house, and told me he had been to see the Huidekopers. I went to Mr. Huidekoper and told him that Marcy had told me that he, Huidekoper, had consented to make a deed to him, and place it in the hands of some Philadelphia man so he could sell and dispose of lands without coming back to Meadville. This was after the presidential election, and after Marcy had gone Phi'd the second time. This conversation was with A. Huidekoper. He said he had offered to make out the deed with my con-

sent. I told Huidekoper I had said to Marcy I would give him eight or ten days from the time he left to return to Philadelphia, and if he within that time would telegraph or write he had positively made a sale, I would consent to Huidekoper's deed, and send it to him; and if he did not he might consider his time out. I was going to *to* take it and go to the city myself. Mr. Marcy had told me he had asked Huidekoper to make a deed to him—consideration, 45,000; and Huidekoper
189 had declined making for more than $40,000. He said same to me, and would not. He had looked over the lands, and, deducting six per cent. for roads, it amounted to 1,288 acres, and he would give a draw back to me of *of* $3,500, and he wanted $37,500 for them. I told him I would wait Marcy's time, and if he reported a sale I would expect him to make out his deed and send it to me. I waited until the time expired and got no report; that was about the 18th or 19th of November, 1864. I then went to Huidekopers (both, I think;) Mr. Al*bert* was there I know. I asked if they would object to making a deed to me as to Marcy. They said certainly not, as that was for my benefit. I asked if he objected to putting a larger amount than $40,000. He said he would not do it. He said he wanted $37,500, and I should have a drawback of $2,500. I asked about the excess, and said if I was not to have that I would not go any further—I had nearly expended $2,500. He said I should have the excess; all he wanted was $37,500. He said he would give me a paper—I was to have a drawback of $2,500. I said his word was good enough to me for $2,500, and he gave me no paper. He told me then to call again in a day or two. I came up. He
190 said the deed was made out for him and his wife; sent for Judge Davis. I waited in office until Davis went out. He came back with deed executed. This is the paper—19 Nov., 1864, ack'd Nov. 21st, 1864.

(Deed given in evidence. See Exhibit E, attached to depositions.)

Alfred Huidekoper came into the office. Frederick W. was there. I asked what time I should have to make sale of those lands. Alfred said he did not think it to my interest to have a time set, as I had a good deal of trouble with it, and he wanted me to have an opportunity, and I should have all the time I required, at least until I notified them I could not sell. Both were present. Tal'ed over about excess. I should have it, and he would give me no paper. I should have drawback of $2,500. I said his word was good to me for $2,500. He then took a letter and put the deed and letter into an envelope and handed to Frederick, & told him to go to revenue office & buy the necessary stamps, & to cancel them & put them on the deed—cancel them all except the date. Frederick & I went down together; bought $100 revenue stamps. He said he would save $3 by buying $100. I saw him cancel on desk, and I saw him mail it to Jay Cook & Co., Phila. That was where he was to deposit the deed. Can't say whether stamps were attached to deed or not. I saw A. Huidekoper writing.
191 Supposed it was a letter to Jay Cook & Co.

(Letter offered and read, date, Nov. 27, 1864.)

Letter. (On his depositing with you $40,000, deliver deed.) Same night or next day I started for Phila.; on the cars met some men. (I had required a map of these lands.) They took down a book which they said contained their estate map. I took it to Colton and got this made from it; went to N. Y.; reached N. Y. next afternoon; searched for Casey. I met him and told him my business; met him at No. 11 Wall st. I told him where deed was; showed him this map here, (copy.) He said he would like to have deed removed to New York. He said he

thought a part of lands he could sell right off. I wrote to Huidekoper that he wanted deed removed to N. Y., and asked them to do it. In a few days got a card from Fred. W. He was stopping at Metropolitan Hotel; went up, saw him, and made an arrangement to meet Casey next day at some office in Broad st. They met; they had a long conversation, most of which I did not hear. He said he would leave the deed with Drake Bro's, N. Y., 23 W'ms st., and Huidekoper wrote address of Drake Bro's and gave it to me so I could know where to find it. Casey and I entered into a written agreement giving him time to sell. I then went home by way of Meadville, to West Va.;
192 returned to N. Y. in ten or twelve days, about Dec'r 10th. Huidekoper told Casey, in my presence, I had unlimited time to sell; that it was a mutual matter between us. At N. Y. I found a letter from Casey, that he had given up trying to sell the property. I then went to work to hunt up some new parties that agreed to pick two men to go out and look at land and report. We left together to look at ground. We were four or five days. I paid the expenses.; parties declined to purchase. I telegraphed to Marcy & he advised me to go to Phila.; went to Phila.; staid a day or two; found a party to send a couple of men to oil country to see the land. We went out again, took them all around and went back; went back to Phila. I paid the expenses. I don't recollect their names, (Henderson) was one; reported unfavorably; went back to N. Y.; found a letter from the Huidekopers. I have not got the letter. Geo. Porter had the letter, and I failed to get it back again. I called on Simeon E. Church, & asked if he wanted to buy. He said he would like to buy a tract of 160 acres on Stewart's Run. I said I would not sell that alone. He told me to call next day. I called next day; met several gentlemen in his office. I made an offer of 500 or 600 acres at a certain price. Solicited
193 two to go and look at it. We went; reported unfavorable. January, 1865, Cyrus Tabor called upon me and asked if I had sold the Pit-Hole lands. I said no. He asked me to come to Wall st. next day; went down and he introduced me to Backus and Morse and others. Made a bargain; put it in writing. This is the contract.

(Pl'ff's written offer made; admitted, & def'ts excepts; agreement read in evidence; Jan'y 10th, 1865. Endorsement of Drake Bros. See Exhibit D, attached to depositions.)

Mr. Stitt continues: Before the paper was executed, I told them where the deed was, and how executed. After the contract was signed, I and two others went over to Drake Bros., and I introduced them. I told Drake I had made a contract. He showed the deed. Morse asked if any doubt about getting the deed on the payment of the money. The deed was inspected by Mr. Morse. I waited until 14th or 13th Jan'y. Morse came and told me they had concluded to take all the lands, and pay ten thousand dollars next day, (Saturday,) which they did the next day. They asked me to get an abstract of title for their benefit from the Messrs. Huidekoper. I had a letter prepared, and as quick as the money was put up, I mailed this letter to Huidekopers. In that I told them I had sold the lands, and before I could get
194 the rest of the money, I would have to have an abstract of title. I saw the $10,000 paid. I told them I had got $10,000 in hands of Drake. Same night went to Washington City. Heard no more till Jan'y 24. When I came to Meadville, called on A. Huidekoper moruing of Jan'y 24, and asked him if he had my letter. He said he had, and had sent an abstract with F. W. Huidekoper to N. Y. I asked if F. W. Huidekoper was at home. He said no, he expected he was on

his way home, or in Philadelphia. He then commenced telling me he was very sorry I had sold those lands; that I had no idea of the excitement caused by the striking of the United States well. He said they were offering fabulous prices—more than I had sold for, and asked me when I was going back to N. Y. I said I expected to go next day. He wanted to know if I thought there was any chance of getting the land back. I told him as the excitement was so great, (I knew nothing of it,) and as Mr. Samuel Q. Brown was one of the purchasers, he knew it, and had an agent in oil country that kept him posted of the different strikes and prices, and it was doubtful if there was any chance of getting rid of the contract. He said on account of the fiduciary capacity he occupied, he almost felt like withdrawing the deed, and asked me if I would not go on that night to N. Y., & see the parties I had
195 sold to, & see if I could not get rid of the contract. I told him if excitement was such, very little chance of getting rid of it, unless they were well paid for it. Said he, I wish you would go right on to-night, and I will agree to pay them from $10,000 to $20,000 for the contract, so as the property might fall back into Huidekopers' hands, and I will give you for your trouble from $6,000 to 8,000. I told him that pay for me would not recompense me, and I declined. He became a little irritated, and said he would fall back on his legal rights, and he would not have taken that position at all, only because he was executor for minor heirs; and we never spoke on the subject since. He asked me if I had a copy of the contract with me. I said I had not. Took train at 10 a. m.; left for N. Y.; reached there Jan'y 25, p. m.; on morning of 26th went to Drake Bros. Asked if abstract had come. He handed it to me, and also a telegraphic dispatch from A. & F. W. Huidekoper, dated Jan'y 24, 1864. (See Exhibit H, attached to depositions.) Abstract of title was in handwriting of A. Huidekoper. I have not got it. I called at Drake Bros. and got a copyist to copy it—Halsted, of house of Drake Bros. I went to Judge Church's office. (This is the copy of abstract I had made.) Notice served on Drake Bros. 27 Jan'y, by pl'ff. I went to see Mr. Morse, and told him
196 the turn things had taken, of the telegram, and asked him if he would help me get the money—$40,000. I got the money. S. Q. Brown gave me the money. I took a responsible man with me. Church found the man. I went and tendered $40,000, and demanded the deed. The man was with me. Demanded deed of Mr. Drake, and he declined, (legal tender,) and produced the telegram. I served a notice on Drakes to hold the deed as my property. It was a written notice. I saw them examining the deed—Casey & Huidekoper. I know F. W. Huidekoper's handwriting.

(Letter dated Jan'y 10, 1865, shown pl'ff. Letter dated Jan'y 18, 1865, shown plaintiff. Letter of A. & F. W. Huidekoper, dated January 14, 1865, shown plaintiff. Letters read. (See exhibits B, C, and D.) Copy of abstract of title offered. Def'ts produce paper purporting to be the original.)

To the court:

ALFRED HUIDEKOPER sworn to give evidence to the court:

The paper is in F. W. Huidekoper's handwriting; the signature is mine. I don't know as this paper was with Drake Bro's. I gave it to F. W. to send it there. We wrote for it and it came back. I merely found paper in office. We both corresponded with Drakes.

F. W. HUIDEKOPER sworn to give evidence to court:

197 This is the paper deposited with Drake Bro's. I made out the paper and deposited it with them, and received it from them.

Mr. STITT. I think the filling up of the paper is the same, but the handwriting is different. Why I feel so certain, was with Halstead when he copied it. *A*, in original was *a*. in Alfred Huidekoper's signature. From the time I took charge of sale—from Sept. 1 to January—spent all my time, except about a month, when in Marcey's hands. Traveling expenses was high; everything high. Kept no memoranda of expenses. Spent very close to 4,000. Huidekopers always kept their office together since 1864.

Cross-examined:

* * * * * Second price was $37,500. Prior to November I was working from a map, then from a deed, a continuance of old arrangement. First arrangement in nature of refusal. He offered to give no writing respecting surplus. He did not say in words it was unnecessary, but was mine, of course; was about two weeks on my western trip; had other lands endeavoring to sell; tried to sell them with Huidekoper's lands; did not spend more than one night at home from

198 November to January. I don't recollect how much I asked Judge Casey. I think from $45,000 to 52,000. He was the only party that I made a written offer to. I think Backus and Morse knew of U. S. well when they sent to me. I did not know of it. Well struck on 9th. Morse put the contract in his pocket or desk. I had no copy. I did not see it till 14th Jan'y. I had no copy; did not send a copy to Hiudekoper's. Never had a copy till this litigation commenced; did not give names of parties in my letter of 14 Jan'y. I wrote him I had sold, & got a deposit of $10,000, and wanted abstract of title; did not mail it until deposit was made; then put it in Drake Bro's letter-box. Arrived in Meadville night of Jan'y 23d, 1865. Saw that evening John W. Farley—not the Huidekoper's. I never told Huidekoper I had made a contract I was not authorized to make & wanted him to ratify it, nor that he ought not to ratify it. I did not engage to go back to N. Y. to withdraw the contract. I first offered them for less than $40,000; never as low as $40,000, after the deed was executed. Jan'y 27, 1865, I tendered

$40,000 to Drake Bro's. Tender made by Watson for me. Wat-

199 son was responsible to tender the money, and kept himself responsible. I had a certified check on Culver, Penn & Co. for $10,000; certified check on 4th Nat. Bank for $8,000. I had $12,400 in hands of Drake Bro's. I drew a check on them for $12,000, and a check on Ja's E. McFarland, of Meadville, for $10,000. My affidavit was I tendered $37,500. I did tender more.

CYRUS TABOR sworn:

Lived in U. S. Hotel, Franklin in '64–'5. This is my signature to contract. It was executed in Backus & Morse's office in N. Y. I was dealing in oil lands in '64. Dec'r, 1864, met Stitt in N. Y. He offered me lands on Pit-Hole I showed them to several parties, did nothing with them, and went home. Early in Jan'y started back.

Deposition of Jos. Casey.
Dep't of Jared C. Marcey.

200 W'm Stitt—again.
Offer No. 1 made and overruled. Pl'ff excepts.

" " 2 " " " Pl'ff excepts.
" " 3 " " " Pl'ff excepts.

16 S. & R., 422, Bollinger vs. Eckert.
9 Watts, 9, Selden vs. Williams.
5 Cas., 92, Barnhart vs. Riddell.
11 Cas., 214.

Deposition of W'm F. Drake ..... offered & read.
" " S. E. Church ..... " "
" " S. Q. Brown ..... " "
" " Lewis Guerner ..... " "
" " Stephen H. Thayer ..... " "
" " Edward L. Halstead ..... " "

Copy of abstract of title, (Exhibit N attached to deposition.)
Envelope containing deed & endorsement thereon, (Exhibit F attached to deposition.) Assignment by Backus & Morse to S. Q. Brown endorsed on back of contract; also re-transfer to Backus & Morse. Declaration of trust, B. & M. and S. Q. Brown.

201 JOSEPH MORSE called for pl'ff & sworn:

Lived Jan'y, 1865, in Jefferson County, Ohio; had a place of business in New York; was engaged with Seth A. Backus, dealing in real estate; contract executed by self and partner. I made inquires of Drake, same day, if deed was deposited with him, as Stitt had told us. He said it was. I saw deed. This is the deed. We associated others and paid $10,000 on the 14th. Before paying it I showed Mr. Drake our contract, and asked if the money was paid the deed would be delivered. He said it would. I paid the money on contract; nothing was said as to the credit it should be placed to. Drake drew form of endorsement. The money paid was legal tender. March 15th, went with Brown and tendered $62,000 to Drake in addition to the $10,000 legal tender; demanded deed from Huidekopers to Stitt, and from Stitt to us. He declined to deliver it. The tender was made to W'm F. Drake of Drake Bros. The $62,000 was more than the contract called for. We made it more in order to avoid any question as to interest from Jan'y 14th; was ready at any time to pay the balance if a satisfactory title was
202 shown. I requested Drake to send for a brief of title to assist our attorneys in examination. He said he or Stitt would. We waited for the abstract until we got notice the deed would not be delivered—about 26th or 27th Jan'y. N. F. Jones, Stitt, Brown, and Drake endorsement' made in our presence. When I called with $62,000 did not propose to deposit it with Drake Bros. Brown said he was ready any time to pay the money on production of deed. I knew of striking of U. S. well when contract was made; advanced my letter at that time; within a week after worth 250 an acre or more. Tabor and Jones were parties. I did not tell Stitt. Sam'l Q. Brown furnished the $62,000. I filed a bill in equity against Huidekopers to enforce specific performance; discontinued the suit because lands had depreciated in value, and Huidekoper agreed to do what was right when he got through with Stitt. I never saw abstract of title until it was produced in court; received a letter from Huidekoper; wrote this in reply.
(Letter dated Sept. 3, 1867.) (See Exhibit H.)
John W. Farley's deposition as to time took to examine title.

203 SETH A. BACKUS called for pl'ff & sworn:

In 1864 & '65 was in N. Y. engaged in business of selling real estate, &c., with Joseph Morse.

(Contract of Jan'y 10th, 1865, shown witness.)

Backus & Morse parties to this contract. We made inquires in relation to Stitt & Huidekopers; examined map, &c. On 14th, Morse took money or check and paid $10,000 with my knowledge and consent. I paid my portion of it. Some time after asked for brief of title. He said he had written a letter for brief of title. On the 15th, N. F. Jones was sent to examine the lands. He spent from 3 to 5 days on the property; came back and reported favorably; a good deal of excitement; delayed from doing anything of survey until Stitt returned, from 18th to 25th. The first I heard of difficulty as to title, Stitt told me Huidekoper had directed Drake not to deliver the deed, and also informed me he had previously sent on brief of title. Previous to seeing Stitt, Brown had told me Frederick Huidekoper had told him he had brief of title. Soon after I went out and spent from 4 to 6 days looking over the property; excitement there; then went to Meadeville to see Huidekoper if any arrangement could be made; our party had already given verbal refusals.

I did not see Huidekoper at Meadville. Subsequently I met
204 A. Huidekoper in N. Y.; when taking depositions, he said were it not for striking that well, and property going up so rapidly, and his situation as executor of the estate of minor heirs, he probably should have given the deed, or made the title, but under the circumstances he thought he would not be doing justice to them. I live in McKean County. I came back there in fall of 1866; lived there ever since.

F. F. A. WILSON called for pl'ff & sworn:

Lived in Meadville since 1848; know the parties to this suit; cannot say whether I was there on 16th; was there from 12th or 13th till Monday. I was there, I think, on Friday & Saturday; think on Monday, & perhaps on Tuesday. I know that on 8th or 9th heard of U. S. well struck; remained at Oil City till Thursday or Friday night, when I came home next forenoon; went to Huidekoper to see if I could get any land in vicinity of Pit-Hole; next day went again—Monday. I saw A. Huidekoper second visit; had a conversation with him; asked if he had any lands to sell at Pit-Hole; he said he had given them to Stitt to sell;

that Stitt had closed out all the lands they had there at about $30
205 per acre, and that he was making out an abstract to send him. He said they had been selling at 1 or 1¼. He expressed no dissatisfaction; this conversation was in the fore part of the day. I think I always said the interview was on either Saturday of second week or Monday of third. I said nothing to Huidekoper of the strike; was not known in Meadville.

Affidavit of defence considered in evidence.

Plaintiff rests.

Defendants' testimony.

ALFRED HUIDEKOPER sworn:

The latter part of August, 1864, was part owner of lands described in deed in evidence. Of those lands 89 acres of tract 172 belonged to estate of H. J. Huidekoper, of which I was surviving executor, and of which I had sole control. Of the balance of the lands I owned the undivided half; the other half belonged to estate of Edgar Huidekoper, which was represented by Frederick W. and myself as executors of his will, with

control over estate. Fred'k W. called my attention to Mr. Stitt
206 about August, and I agreed to do this: made out map of lands; fixed price at $30 an acre. He came in; gave him map and price;

told him we would agree to hold land at that price for 30 days, if in that time he brought a purchaser. I had put on margin price, time, number of acres, and that I wished him to understand that I did not make him my agent; but, if he brought a purchaser within that time, I would allow him that commission out of purchase-money; if he did not, he would lose commission, and we would lose the time. He said, I understand that well; how will it be if I get more than the stipulated price? I said, You have read the fable of substance and shadow; don't lose your commission by trying to get more. Only conversation about any excess. About 18th Nov'r, after time had run out, Stitt called and said he had failed to find a purchaser, but he thought if I would give him a little indulgence, a party in Philadelphia would money in a few days. I proposed giving eight days. I agreed to give till Dec'r 1st. He requested a deed to be placed in hands of Jay Cook & Co. Frederick and Stitt said they found there was about 1,280 acres. They agreed we should have $40,000, and both came and requested me to make out a deed in
that way. I wrote the deed Nov. 19th. Next day Stitt called,
207 and said he wanted some writing to satisfy parties he had authority till Dec'r 1st to raise the money. I wrote him a paper, got Frederick Huidekoper to sign it, and gave to Stitt, "That the offer to W'm Stitt is extended till first day of Dec'r, the price to be $40,000, the money to be deposited with Jay Cook & Co."—(substance of it.) The arrangement with Stitt and myself was, that the $40,000 be paid to Jay Cook & Co., and we would refund the $2,500 to him at Meadville. I said t'was due to him so large a matter as $2,500 ought not to be left in parol, and I would give him a writing to that effect. He said my word was abundant' good for that. I prepared a writing to that effect. Frederick and I signed it, and gave it to him. Frederick then took deed and letter I had written to Jay Cook & Co.—all about interview. The paper in relation to $2,500 was given on same day as the other. Letter is dated 27, but I know it is an error. I have sworn the 22nd. About 28 Nov'r, Frederick Huidekoper started for N. Y. or Philadelphia. I requested him to see Stitt, and, if money not paid Dec'r 1st, to say that all arrangement, so far as I was concerned, was at an end. I met Frederick on 1st Monday of Dec'r, after he returned. He was going to War-
ren on that morning train. I asked if he had seen Stitt and
208 Judge Casey, and gave the notice; said that had made an arrangement that Casey should have eight or ten days, and Stitt had agreed to allow us $45,000, and had taken deed over and placed it at Drake Bro's, with directions to let Judge Casey see it. He hurried away. I remarked we could get deed, and bring it home. After he returned from Warren, he gave a more detailed account. I told him I was not willing deed should remain under that arrangement at $45,000; a new deed was necessary and additional stamps. I had no communication with Stitt or Casey in relation to the transaction, nor did I ever hear or know of deed being left at Drake Bro's in escrow until after this trouble commenced. Frederick Huidekoper said he left them subject to our further orders. Some time in Dec'r, 1864, Stitt came in, and I said, You and Frederick had a talk about those lands at a different price. He made no reply, smiled, and nodded his head. I said things are so revolutionary there I can't say what I will do in the future. If, in drifting about, you have any offers to make, I will give you a prompt answer. This was Jan'y 16, 1865—evening, if I remember rightly. Frederick
showed me a letter he received from Stitt about some Sugar-Creek
209 land, in which he requested an abstract of title of Pit-Hole lands might be left with Drake Bro's. Both of us have looked for let-

ter; cannot find it. He was going to N. Y. that evening. We had memor'da of our title. He sketched it, and I put my name to it, and he took it to N. Y. About 20th or 21st Nov., Stitt came to our office and inquired for Frederick. I told him he was in Philadelphia, and would be home in a day or two. He called again 24th Jan'y, 1865, morning, and spoke about the Backus & Morse contract. He said he had made an arrangement, such as mentioned, except what sold for, and said he had no authority to make such a contract, but he thought I had better adopt it. I told him it was that kind that I was all along unwilling to make, and I would not accept or ratify it as binding on me at all. He said he had had great difficulty to get Backus & Morse to go into it, and they might back out of it. He said some of the tracts were very rough, (No. 124,) and I spoke of what I had heard of the value of those lands worth a great deal more. He asked me if I had received a letter asking for abstract of title. I told him Frederick had shown me the letter, and had taken on one, but, if it referred to this matter,
210 amounted to nothing. I would not agree. I was not sole owner of lands, and did not consider I had a right to do as I pleased with them, and, acting as executor, no court of equity would justify me in accepting that contract with my knowledge of the value of the lands. I then told him that good faith required that the parties in N. Y. should be promptly notified, so that they could take their money if they were waiting for me to accept that contract, so that they might lose no interest. He said I was under no obligation to accept it. He thought I ought not to ratify it. I offered to write to Drakes to notify the parties. He begged me not to do it; that he would go to N. Y. and notify them himself. He then asked me what position he would occupy as to responsibilty to them. I asked him why he did not bring a copy of the contract to show me. He said some one had not given him a copy as they agreed, and he had none. He agreed to go on and notify them, and I told him I would give him no more time to operate. He said if I would wait he would allow us $45,000 when paid. Mr. Zane was in office, and gave me information of value of lands, and I told him what Zane had told me of their value. Towards evening Frederick re-
211 turned from Philadelphia. He suggested to telegraph to Drakes'. We went down about dusk, or after candle-light, and sent telegram evening of the 24th; can't tell precise hour. Next day we sent the letter, in evidence, to Drakes'. Saw Stitt next about 6th Feb'y. I expressed some surprise at the course he had taken in N. York. I had heard of it. He said he had been obliged to do what he did by the parties in N. Y., but if he and I would put our heads together we could get back the deed from Drake, and the N. Y. parties could not do anything. I said I had been disposed to be friendly to him, and liberal, but, if he ran into litigation, I should stand on my legal rights. On Feb'y 7 or 8, had an interview with S. Q. Brown. Nothing further occurred until next summer, when I called at Drakes' to find out by what authority he put the envelope on deed. Gerner said he had received the deed from Frederick, and if there was anything on deed he (G) must have made it. He went with me to Drakes' and got the deed, and said the endorsement was Thayer's handwriting. We then got Thayer, and he said he thought he had made it by direction of W'm F. Drake. He denied it. Subsequently called on Morse. When Stitt called, Jan'y 24, he gave me the names of Backus and Morse. Never before
212 *never*, made an offer of money to him or these parties. I don't recollect conversation. Letter of Jan'y 10 would have reached us Jan'y 16, evening. No knowledge of sale except in that letter. Tract

124 Zane said might be worth 2 or 300 per acre, 331 acres. * * * Was once a lawyer. Have not been at the bar for 7 or 8 years. Kept a letter-press copy-book. When we made a contract we made duplicates. I kept no copy of the Stitt papers.

JOHN P. ZANE sworn:

Was in Huidekoper's office in Jan'y, '65—14th Jan'y, 1865. This contract assigned to me by Ja's Brown, Jan'y 24, 1865. 10 or 11 o'clock a. m. went to office. Stitt, Huidekoper and lady in office. Stitt & Huidekoper talking together in office in reference to lands in neighborhood of Pit-Hole. Being interested in lands there I paid attention. Stitt, after speaking of U. S. well, said Huidekoper was under no legal or moral obligation to ratify the sale; was not in accordance with Huidekoper's instructions to him. Then spoke of notifying parties at East in reference to it. Stitt urged Huidekoper to notify the parties in N. Y. is my impression, and said he would go to N. Y. and notify
213 them that Huidekoper would not ratify the sale. Stitt urged Huidekoper not to ratify the sale. I heard no consideration asked for Stitt.

HENRY HUIDEKOPER sworn:

Am a nephew of Alfred Huidekoper. In winter of 1864 & '65 Stitt came to my place of business and asked where Frederick was, and said he had sold the lands. I asked him what lands; said some he had undertaken to sell of A. & F. W. Huidekopers. I said I presume they will be glad to hear that. He said I don't know about it. I asked what the price was. I think he said about $45,000. He had not sold according to the terms given him. He said terms were strictly cash. He had to give 60 days, and he thought it a first-rate sale, considering the depreciation of lands in oil regions; don't know what time in winter it was. I returned 1st or 2nd of Dec'r. In Meadville, my place of business—F. W. Huidekoper was a partner of mine—middle of afternoon; am nearly 32; am older than Frederick; no Saturday night mail to Meadville. I asked if parties were good. He said yes.

* * * *

JARED C. MARCEY sworn:

Not employed by Stitt. He, at Oct. or Nov'r election, spoke
214 about having about 1,300 acres near Pit Hole; inquired price, terms, and time on which he had it. He gave the time—30 days.

* *

KENNEDY MARSHALL sworn:

Endorsement written by me, Nov'r 15, 1865, at Astor House. Backus & Morse came to me. It is my signiture, and that Backus & Morse's. Morse had the paper; was with Stitt when he called for money to tender; they had not the money then; said it would be forthcoming in 60 days; went to Brown's office; present at alleged tender; introduced as his counsel, by Stitt, to Drake. I gave instructions to the man how to make tender. He did not do it. I then tendered $41,000, and demanded the deed; served notice on Drake to retain the deed. I prepared the notice, in my handwriting; Church had nothing to do with it. Drake kept the money; don't recollect that Stitt had the money in hands; never authorized to make endorsement.

ALFRED HUIDEKOPER, recalled:

Church called personally, in Dec'r 1864. I spoke to Frederick; he

might drop a line to Church. My recollection is, I declined. He might call upon Mr. Stitt and see if they could make any satisfactory offer.

215 K. Marshall.
J. B. Marcey.

CLINTON MCCULLOUGH sworn:

Live in Meadville; am postmaster; mail reaches Meadville Monday afternoon, at 3 o'clock.

FREDERICK W. HUIDEKOPER sworn:

Am a defendant; in latter part of Aug't, 1864, Mr. Stitt came into the office. We showed him our map of oil-lands, and made a map of these lands for him, and noted on margin price of them, $30 an acre; time given to operate, 30 days, and commission if he brought us a purchaser, was $2,500. About 19 Nov'r Mr. Stitt came to office and said if we would make out a deed for lands, and give him a few days longer to operate, and send deed to Phila., he thought he could close up the transaction. He and I then looked over map and found there was about 1,287 or '8 acres, at $30 an acre, not quite 40,000. I said as we had given some extension of time I'd make it 40,000; commission, $2,500 We agreed he should have until Dec'r 1st to close up transaction.

216 Deed was written, and on Nov. 22 Stitt came to office. He and A. Huidekoper talked at adjoining table. Uncle called me over, and handed me two pieces of paper he had been writing, and which he had signed. One was, time and price to Stitt was hereby extended to Dec'r 1st; recited the number of acres; consideration, $40,000; other, a memorandum. He was to receive $2,500 if the $40,000 paid in Philad. Uncle handed me the deed, and also the letter he had written to Jay Cooke & Co. I took them down street, with Stitt, and bought some stamps, and attached forty dollars to the letter, wetting corner of stamps; letter erroneously dated; copied in letter-book as of 22nd. Cash book, stamps, show that stamp were bought on 22nd, and draft referred to was drawn on same day. I put the deed and letter in post-office, on 28th Nov'r. I was going to N. Y. & Philad. My uncle directed me, if on 1st of Dec'r the $40,000 was not paid, and deed lifted, to take deed away and bring it home, and if I saw Stitt to tell him the arrangement was at an end. I saw Stitt in N. Y. Nov'r 30, and said I was going to take deed home with me. He said he was operating with Judge Casey, with a good chance of success. I went with him to

217 Casey's office morning of Nov. 30. He said he thought they could accomplish a sale in a few days, but he would like to see the deed, and see if it corresponded with the map, and suggested I should bring the deed over and leave it with Fisk and Hatch. I said no, we had our own broker, Drake Bro's; would leave it with them, and give directions that he might see it. He said he wanted some definite time to know the matter would not be taken out of his hands; 15th Dec'r would be extreme limit he would want, probably only a few days, and he would inform Stitt promptly. Dec'r 1st took it away from Jay Cook & Co.s; next day returned to N. Y.; went first to Judge Casey, and told him would leave it at Drake Bro's, with directions for him to see it; went to them; saw Lewis Gerner, and handed him the deed; took out stamp & handed them to him; here is a deed I want to leave, to be delivered when money was paid; directions to show Judge Casey; we would authorize Drake to cancel stamps; returned to Meadville same day; saw uncle Monday morning, 5th Dec'r, just as I was starting to Warren. I spoke of leaving deed at Drakes'; told him it was left at our own pur-

pose; at 10 Dec'r learned Casey' transactions at an end. And so matters ran along till 16th Jan'y; afternoon of that day I got a let-
218 ter from Stitt, especially in reference to Sugar-Creek lands I had had some correspondence with him about, and in this letter he asked to have a brief of title of Pit-Hole lands sent to Drakes'. I have not the letter. I think he said he had sold the lands; made out the abstract; my uncle signed it, and I took it that night to N. Y.; left it with Drake Bro's, January 15; returned home Jan'y 24th, and sent dispatch recalling deed; telegram sent about 6 p. m. Brown told me he was one of parties who had bought; did not show me the contract, or tell the price, or conditions; very reticent; did not see contract till Feb'y 6. I may have said al' right if Stitt had sold according to our agreement with him. I said to Brown if Stitt had not made a positive sale we would withdraw the lands. I saw Drake and handed this abstract of title. I think I said lands were worth a great deal more than we were going to get for them, or agreed to take for them: nothing said of terms of contract; knew nothing of terms. I think I saw Brown first. Drake did not tell me they had $10,000 on deposit respecting this transaction. I suggested the telegram.

JAMES E. MCFADDEN sworn:

218 Meadville, in Jan'y, 1865. A private banker. Stitt, kept an account with me in Jan'y 27th, 1865; account overdrawn.

Affidavit of plaintiff accompanying præcipe $37,500.

A. A. Drake's testimony on former trial read.

Defendants rest.

Plaintiffs.

Copies of will in evidence.

F. F. A. WILSON was not in Meadville 9th Nov., 1864; returned from West a few days before Christmas.

John W. Farley's evidence read:

MORSE. I did not tell A. Huidekoper my counsel told me I could not recover; arrangement to discontinue was in June, 1867. Stitt repudiated the endorsement, and said Marshall had no authority to make it.

220 STITT heard Henry Huidekoper; the interview he spoke of never occurred.

Drake Bro's closed generally at 3 or 3½.

MORSE. Banks closed at 3; brokers at 4 or 5.

BACKUS. Banks closed at 3; brokers 4 to 5.

SAM'L L. FULWOOD sworn:

Telegraph operator; manager Union Tel. Think it was sent in morning.

W'M E. SCHMERTZ sworn:

Pres'd't 3rd Nat. Bank.

My impression is letter has not been copied.

W'm L. Taylor sworn:

Letter-book.

221 EXHIBIT A.

MEADVILLE, PA., *Nov.* 27, 1864.

Mess. JAY COOKE & CO., *Philada.*

GENTS.: Your fav. of 19 inst., advising us of deposit by Mr. S. H. Standart, has been rec'd.

We now enclose a deed for lands in Venango County to William Stitt, of this place, who leaves to-day for Phila., to obtain means to pay the

purchase money. On his depositing forty thousan dollars with you to our credit, please deliver to him the deed. We will advise you soon as to the ap'lication of funds.

Respectfully yours,

A. & F. W. HUIDEKOPER.

We enclose stamp to be attached in case deed is delivered. We will probably draw on you fav. J. R. Dick & Co., for $7,000 to-day.

A. & F. W. H.

222 EXHIBIT B.

MEADVILLE, *January* 10, 1865.

WILLIAM STITT, Esq., N. Y.

DEAR SIR: I have been unable to write you anything about the 49 acres on Cherry Run before this. The 49 acres (next Clark's) are sold. The 49 acres below these (next Goss' land) can probably be bought for $1,000 an acre, but not for anything less. It is a nice piece of land, as you know. If Col. Puleston or Lowry wants it at such a price, you can telegraph me or write, and I will send maps, &c. Hoping to hear soon of your sale of the 1,300 acres, I remain yours, truly,

F. W. HUIDEKOPER.

I have nothing of 2,000 acres on Tionesta yet.

223 EXHIBIT C.

MEADVILLE, *January* 13, 1865.

W'M STITT, Esq., N. Y.

DEAR SIR: The well of 250 barrels per day, which was struck on Pit-Hole last Saturday, as near as I can learn, is on tract No. 122, just below the forks of Little and Big Pit-Hole. I am not certain that it is on that tract, but suppose it to be.

John Farrelly told me you had effected a sale in 3 parts of 1,300 acres. T't No. 162 ought to be very valuable, and T't 124 ought to sell very well.

Hoping to hear from you very soon of the final settlement, I am,

Yours, resp'y,

F. W. HUIDEKOPER.

Excitement is high on Pit-Hole.

224 EXHIBIT D.

MEADVILLE, *January* 14, 1865.

W'M STITT, Esq., N. Y.

SIR: The excitement on Pit-Hole, I think, would justify us in withdrawing the lands at present from the market, unless you have made a positive sale. The well is on the Holman farm, just below the forks of Big and Little Pit-Hole. You have no idea of the excitement that well is causing.

Let me hear from you as soon as possible. I do not now know whether I shall be in N. Y. next week or not.

Yours, resp'y,

A. & F. W. HUIDEKOPER.

225 EXHIBITS E & F.

Copy of endorsements on back of contract between William Stitt and Backus & Morse, dated 10 January, 1865.

For value received, we hereby assign and transfer all our right, title, and interest in the within contract to Sam'l Q. Brown.

S. A. BACKUS.
JOSEPH MORSE, JR.

NEW YORK, *January* 14, 1865.

[5-c. I. R. stamp, canc'l'd.]

For value received, I hereby assign, transfer, convey and set over, all my right, title, and interest in the within contract and assignment thereof to S. A. Backus & Joseph Morse, jr., to have and to hold the same to them, their heirs, and assigns forever.

Dated New York, Sep't 11th, 1865.

SAM'L Q. BROWN.

[5-c. I. R. stamp, cancelled.]

226 EXHIBIT H.

177 WATER STREET, *September* 3, 1867.

ALFRED HUIDEKOPER, Esq.

DEAR SIR: After a long absence in the country, I find your letter on my return, my son having mislaid it and neglected to forward it. You need not give yourself any further trouble about the suit. I shall not press it any further, but shall carry out my understanding with you.

Yours truly,

JOSEPH MORSE, JR.

227 EXHIBIT G.

Whereas one William Stitt did, by an agreement made the 10th day of January, 1865, agree to and with Seth Backus & Joseph Morse, jr., to convey to them certain lands in Allegheny Township, Venango County, Pennsylvania, the title to which was then in Alfred & Frederick Heidekooper, as individuals & executors, and which lands are described in a certain deed made by said Heidekoopers to William Stitt, which deed was left with Drake Brothers, bankers & brokers, No. 23 William street, reference to all which is hereby had for a more particular description; and whereas afterward the said Backus & Morse assigned all their right, title, & interest of & in said agreement said lands *lands* to Samuel Q. Brown; and whereas said Backus & Morse now desire a re-assignment of whatever interest the said Brown may have in said agreement & said lands, & at their request said Brown has agreed to & has conveyed said interest to them, receiving as consideration therefor an agreement to purchase one house & lot on the south side of 78th street, between 2nd & 3d ave's, in the city of New York, from one Henry Noble, and to
228 be paid by said Noble, in addition the sum of five hundred dollars; and whereas it is doubtful if the title to said house and lot is good, and if same should not be good then said Brown is not to take the said house & lot, and the said Backus & Morse are then to assign & convey the interest assigned to them by said Brown in said agreement to such person as he may designate: Now, therefore, this indenture of agreement witnesseth that, in consideration of the premises & of one dollar to them in hand paid, the said S. A. Backus and Joseph Morse, jr., do hereby covenant, promise and agree to and with said Samuel Q. Brown, that in the event of the imperfectness or invalidity of the title to said house & lot so that said Brown cannot secure a good title thereto, then

they, the said Backus & Morse will, at the request or upon the demand of said Samuel Q. Brown, convey, assign, and transfer all of the right, title, & interest to them conveyed by said Brown in the agreement first aforesaid to Robert Loutter, or such other person as may by said
229 Brown be designated, or if the said Noble should fail to pay said Brown the said sum of five hundred dollars, then the said interest shall in like manner be assigned & transferred as may be designated by said Brown.

In witness whereof the parties hereto have hereto set their hands & seals this eleventh day of September, in the year one thousand eight hundred and sixty-five.

S. A. BACKUS. [SEAL.]
JOSEPH MORSE, JR. [SEAL.]

Signed, sealed, & delivered, in the presence of—
HENRY J. SCUDDER.

(Here follows map, marked page 229.)

230

231 EXHIBIT "B."—C. N., *Com'r.*

This agreement, made this 10 day of January, 1865, between William Stitt, of Meadville, Pa., party of the first, and Seth A. Backus & Joseph Morse, jr., of the second part, witnesseth that the said party of the first part, for and in consideration of the sum of one dollar, to him paid, hereby agrees to sell to the party of the second part, all those certain pieces or parcels of land lying and being in Allegheny Township, Venango Co., Pa., and described as follows: Being all the lots marked in red or pink on a map furnished by said Stitt to the parties of the second part; or said parties of the second part may elect to take the lots of 105 acres on No. 165, No. 172 & 171, & No. 213, making 518 acres, or all the balance of 1,288 acres, rejecting the 518 acres, or the whole 1,288 acres, as they see fit, the price of the land taken to be fifty-five dollars per acre. If the said Backus & Morse, or their assigns, decide to take either portion, or all of said lands, they are to deposit with Drake Bros., 23 William st., on or before the 14th inst., ten thousand dollars, to be paid to said party of the first part as soon as the titles are examined and found perfect, and the deed is to be deposited with the same parties until the balance of the purchase-money is paid, or satisfactorily secured to the party of the first part, when the deed is to be delivered to the party of the second part. The time of payment of the balance is not to be extended beyond sixty days from the date of the first payment, and may be made at any time by depositing with Drake
232 Bro's. If said deposit of ten thousand dollars is not made with Drake Bro's by the 14th inst., then this agreement to be null and void.

Witness our hands this 10th day of Jan'y, 1865.

W'M. STITT.
S. A. BACKUS.
JOS. MORSE, JR.

Witness—
CYRUS TABOR.
W. F. JONES.

[5 ct. U. S. stamp cancelled.]

(Endorsement on back:)

NEW YORK, *January* 14, 1865.

Backus and Morse have this day deposited with us ten thousand dollars on the within contract & deed to take the whole 1,288 acres, it being at the same time agreed and understood that, if the title is not valid, the above $10,000 is to be returned to Backus & Morse; and if the balance of the purchase money is not deposited by the time specified in the contract, the $10,000 is to be forfeited to Mr. Stitt.

(Signed) "DRAKE BRO'S."

On the margin Drake makes a minute: "March 15th, '65—2.5 p. m. $62,000 tendered."

That is the whole original, except some assignments from B. & M. to other parties, & re-assignments to them.

233 EXHIBIT "C."—C. N., *Com'r.*

MEADVILLE, *Dec'r* 19, 1864.

S. E. CHURCH, Esq., *New York.*

DEAR SIR: Mr. William Stitt, who has the control of the 160 acres from T. No. 213 on Stewart's Run, which you are anxious to buy, can be found at the office of Messrs. Walden, McCann & Co., No. 13 Broad st., N. Y. He no doubt will be willing to sel' to you, if the parties now considering do not take the land.

Yours respectfully,

A. & F. W. HUIDEKOPER.

234 *Exhibits to depositions.*

"EXHIBIT D."—C. N., *Com'r.*

This agreement, made this 10th day of January, 1865, between William Stitt, of Meadville, Penna., party of the 1st part, and Seth A. Backus and Joseph Morse, jr., of the second part, witnesseth that the said party of the first part, for and in consideration of the sum of one dollar, to him paid, hereby agrees to sell to the party of the second part, all those certain pieces or parcels of land lying and being in Allegheny Township, Venango Co., Pa., and described as follows: Being all the lots marked in red or pink on a map furnished by said Stitt to the parties of the second part; or said parties of the second part may elect to take the lots of 105 acres on No. 165, No. 172, & 171, & No. 213, making 518 acres, or all the balance of 1,288 acres, rejecting the 518 acres, or the whole 1,288 acres, as they see fit—the price of the land taken to be fifty-five dollars per acre.

If the said Backus & Morse, or their assigns, decide to take either portion, or all of said lands, they are to deposit with Drake Brothers, 23 William st., on or before the 14th inst., ten thousand dollars, to be paid to said party of the first part, as soon as the titles are examined and found perfect, and the deed is to be deposited with the same parties until the balance of the purchase-money is paid or satisfactorily
235 secured to the party of the first part, when the deed is to be delivered to the party of the second part. The time of payment of the balance is not to be extended beyond sixty days from the date of the first payment, and may be made at any time by depositing with Drake Brothers. If said deposit of ten thousand dollars is not made

with Drake Brothers by the 14th inst., then this agreement to be null and void.

Witness our hands this 10th day of Jan'y, 1865.

WILLIAM STITT. [L. S.]
S. A. BACKUS. [L. S.]
JOSEPH MORSE, JR. [L. S.]

Witness—
CYRUS TABOR.
W. F. JONES.

[5 cts. U. S. stamp cancelled.]

(Endorsement on back :)

NEW YORK, *Jan'y* 14, 1865.

Backus and Morse have this day deposited with us ten thousand dollars on the within contract & deed, to take the whole 1,288 acres; it being at the same time agreed and understood that, if the title is not valid, the above $10,000 is to be returned to Backus & Morse, and if the balance of the purchase-money is not deposited by the time specified in the contract, the $10,000 is to be forfeited to Mr. Stitt.

(Signed) "DRAKE BRO'S."

On margin Drake makes a minute: "March 15, '65—2.5 p. m. $62,000 tendered."

236 For value rec'd, we hereby assign and transfer all our right, title, and interest in the within contract to Sam'l Q. Brown.

New York, Jan'y 14, 1865.

(Signed) S. A. BACKUS.
JOSEPH MORSE, JR.

[5-c't U. S. stamp, cancelled.]

For value received, I hereby assign, transfer, convey, and set over all my right, title, and interest in the within contract and assignment thereof to S. A. Backus and Joseph Morse, jr., to have and to hold the same, to them, their heirs, and assigns forever.

Dated New York, Sept. 11, 1865.

SAM'L Q. BROWN.

[5-c'ts U. S. stamp, cancelled.]

For and in consideration of the sum of one dollar, to each of us in hand paid by the several parties thereto, it is understood and agreed by and between the several parties to the within agreement that the time of payment of the balance of purchase due, and the delivery of the deed for the property, is extended for the period of fifteen days from the fifteenth day of March, A. D. 1865.

Witness our hands this 14th day of March, 1865.

W'M STITT,
Per KENNEDY MARSHALL, *Att'y.*
SETH A. BACKUS.
JOSEPH MORSE, JR.

[5-c't U. S. stamp, cancelled.]

237 EXHIBIT "D."

This is the copy of the original contract and endorsements referred to by us, the undersigned, in our respective depositions hereto annexed.

We have each of us examined this copy with the original, and find it to be a true and correct copy thereof, and endorsements thereon, and of the whole thereof.

SAM. Q. BROWN.
JOSEPH MORSE, JR.

(Indorsed:) Agreement between W'm Stitt and S. A. Backus and Joseph Morse, jr.

238 EXHIBIT "E."—C. N., *Com'r.*

This indenture, made the ninteenth day of November, in the year of our Lord one thousand eight hundred and sixty-four, between Alfred Huidekoper and Catherine, his wife, said Alfred executor of Harm Jan Huidekoper, deceased, and said Alfred and Frederick W. Huidekoper, executor of Edgar Huidekoper, deceased, all of the county of Crawford, and State of Pennsylvania, of the first part, and William Stitt, of the county and State aforesaid, witnesseth:

That the said parties of the first part, for and in consideration of the sum of forty thousand dollars, money of the United States, to them in hand paid by the said party of the second part, at and before the ensealing and delivery of these presents, the receipt and payment whereof they do hereby acknowledge, have granted, bargained, sold, released, and confirmed, and by these presents do grant, bargain, sell, release, and confirm unto the said party of the second part, and to his heirs and assigns all those pieces of land situate in Allegheny Township, in the county of Venango, in the State of Pennsylvania, described as follows, viz: Three hundred and thirty-one acres, from the east end of tract No. one hundred twenty-four, (124,) bounded on the north, south, and
239 east sides by the tract lines, and on the west by land conveyed to David Cutter; also, one hundred twenty-nine acres from the northwest corner of tract No. one hundred sixty-two, (162,) bounded on the north and west by the tract lines, on the east by land conveyed Ja's D. Tyrrell, and on the south by land conveyed to Samuel Young; also, one hundred and five acres from the east end of tract No. one hundred and sixty-five, (165,) bounded on the north, south, and east sides by the tract lines, and on the west by land conveyed to Benjamin Tyrrell; also, one hundred sixty-four acres from tract No. one hundred seventy-one, (171,) bounded on the north by the north line of the tract, on the east partly by the east line of the tract and by land of Jacob J. Miller, on the south by land of Jacob J. Miller, and on the west by land contracted for by Sam'l W. Stewart; also, eighty-nine acres from the southeast corner of tract No. one hundred seventy-two, (172,) bounded on the south and east by the tract lines, west by land conveyed to John Siggins, and north by lands conveyed to Davies T. Lovell; also, one hundred and eleven acres from the southeast corner of tract No. two hundred eight, (208,) bounded on the east and south by the tract
240 lines, on the west by lands conveyed to Sidney Pratt, and on the north by the land of the grantor, as surveyed; also, one hundred and sixty acres from the southwest corner of tract No. two hundred thirteen, (213,) bounded on the south and west by the tract lines, on the north by land conveyed to John Southerland, and on the east by lands conveyed respectively to John Rohrer and W'm T. Richardson; also, one hundred and five acres from the southwest corner of tract No. two hundred twenty-three, (223,) bounded on the west and south by the tract lines, on the north by land conveyed to John Griffin, and on the

east by lands conveyed to David Kelly; also, seventy acres from the northeast corner of tract No. two hundred and twenty-four, (224,) bounded on the north and east by the tract lines, on the west by land conveyed to David Barrett, and on the south by land conveyed to C. H. Matthewson; also, twenty-four acres of land from the southeast corner of tract No. two hundred twenty-five, (225,) bounded on the south and east by the tract lines, on the west by land conveyed to John Grandin, and on the north by land conveyed to S. Grandin, extending sixty-five perches from north to south; the whole land herein conveyed containing twelve hundred eighty-eight acres, net measure;
241 together with all and singular the rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereto belonging, and the reversion and remainders, rents, issues, and profits thereof, and also all the estate and interest whatsoever of them the said parties of the first part, in law or equity, of, in, to, or out of the same:

To have and to hold the premises hereby conveyed, or intended so to be, with the appurtenances, unto the said party of the second part, his heirs, and assigns, to the use of the said party of the second part, his heirs and assigns forever. And the said parties of the first part, their heirs, executors, and administrators, do hereby covenant and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, their heirs, the above-mentioned and described premises, with the appurtenances, unto the said party of the second part, against the said parties of the first part and their heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same, by, from, through, or under them, shall and will warrant and forever defend by these presents.

242 In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ALFRED HUIDEKOPER. [SEAL.]
CATHERINE HUIDEKOPER. [SEAL.]
ALFRED HUIDEKOPER. [SEAL.]
FREDERICK W. HUIDEKOPER, [SEAL.]
Executors of Edgar Huidekoper, dec'd.
ALFRED HUIDEKOPER, [SEAL.]
Ex'r of Harm Jan Huidekoper, dec'd.

Sealed and delivered in presence of—
W'M DAVIS, JR.

STATE OF PENNSYLVANIA,
Crawfor' County, ss:

Before me, the subscriber for said county, personally came the above-named Alfred Huidekoper and Catherine, his wife, and acknowledged the above indenture to be their act and deed, to the end that the same might be recorded as such, the said Catherine being of full age, and by me separate and apart from her said husband duly examined, and the contents of the above indenture fully made known to her, declared that she did voluntarily and of her own free will and accord, and without any coercion or compulsion on the part of her said husband, sign, seal, and deliver the same. The said Alfred also acknowledged the same, as his act as executor of Harm Jan Huidekoper, dec'd, and said Alfred and Frederick W. Huidekoper personally acknowledged the same as their

act as executors of Edgar Huidekoper, dec'd, and desired it to be so recorded.

In witness whereof I have hereunto set my hand and seal this 21st day of November, 1864.

W'M DAVIS, JR., [SEAL.]
Associate Judge.

243 COUNTY, *ss:*

Recorded in the recorder's office, county in deed-book page
Witness my hand seal of said office this day of 18.

Recorder.

Stamps pinned, on: $20 Gov. stamp. A & F. W. H, 1864. $20 Gov. stamp, 1864.

I certify this to be a true copy of the original deed referred to by me in my deposition hereto annexed, and that the map hereto annexed is a true copy of the original map affixed to the said original deed, having compared these copies with the originals of each of them, with the com'r who took my deposition.

W'M F. DRAKE.

244 (Here follows map, marked page 244.)

245 EXHIBIT "F."—C. N., *Com'r.*

Envelope and endorsement.

$40,000. Deed of Huidekoper to Stitt.
To be delivered to Stitt when he pays for it.
Allow Judge Casey to look at deed when he calls.

246 EXHIBIT "G."—C. N., *Com'r.*

MEADVILLE, *Feb'y* 8, 1865.

Mess's DRAKE BROS., *N. Y.*

GENT'M: Your favor of the 8th inst. is received, and contents noted. We hope when we have all the facts in the case to be able to arrange the matter without much trouble. Mr. Brown called upon me yesterday & gave us a copy of Mr. Stitt's contract with Messrs. Backus and Morse, which we have sent to our attorneys, Emerson & Prichard. When convenient please inform us of last sale of gold for us, also price of 7.30 bought. If the brief of title, which I left with you on my way to Philadelphia is still in your hands, and you feel free to do so, we should be glad to have it returned to us by mail.

Yours, respectfully,

F. W. HUIDEKOPER.

W. F. D. 7th Nov'r, '68. A copy to be sent.

247 EXHIBIT "H."—C. N., *Com'r*

[Telegram.]

JAN'Y 24, 1865. Received 10 m. by telegraph from Meadville, 24.

To DRAKE BROS., 23 *William st. N. Y.*

No. 1. Consider Stitt's deed withdrawn, and subject to our further orders.

A. F. W. HUIDEKOPER.

10—pd. 135.

248 EXHIBIT "I."—C. N., *Com'r.*

MEADVILLE, *Jan'y* 25, 1865.

Messrs. DRAKE BROS., *N. Y.*

GENTS: Your favor of the 14th inst. mentions that you still hold $150 of unsold gold int. collected for A. H. Please sell this and credit us proceeds. We did not wish any gold reserved. We received yours of 23d inst. noting purchase of $1,000 7.30.

You may forward this and the reg. 5.20*s* in yours hands to us by mail. Please give us amount in all of gold sold for 81 int. and also price of 7.30 bought.

We telegraphed to you yesterday that the deed to Mr. Stitt was withdrawn, and to hold it subject to our further order as we do not consider that offer as any longer open. You may enclose the deed to us by mail.

Yours, respectfully,

A. & F. W. HUIDEKOPER.

F. W. H., was called home from Phila. on business, and did not stop in New York, or he should have called to see you again.

Copy of mem'd on back: A. & F. W. Huidekoper. Jan'y 25, 1868. MAY 16, 1866, W. D.

249 EXHIBIT "*J.*"— C. N., *Com'r.*

MEADVILLE, *Jan'y* 30, 1865.

Messrs. DRAKE, BRO'S, N. Y.

GENT'M: We are somewhat surprised at the notice served upon you by Mr. Stitt, as the deed referred to represents no contract or agreement of any kind lately existing between us. Mr. Stitt with a view to a commission on sales, last week reported us that he could sell lands in Allegheny Township, so as to pay us $45,000, and keep a commission from proceeds. He was distinctly informed by our Mr. A. H., Mr. F. W. H. being absent, that the offer was not accepted and that as executors, with present information, we did not feel authorized to sell for any such price. He left for New York promising to send us a copy of the offer he had made, and we hope when he returns he may be able to give some explanation of his apparent bad faith in the premises. As the paper is our private property, and we have recalled it, we trust there is no impediment in the way of your sending it to us, as we prefer if Mr. Stitt wishes to inaugurate any legal proceeding that it should be done here direct with ourselves. We have no recollection of giving your firm any instructions about this deed prior to its recall by us. If
250 you feel at liberty to return it to us, please to do so by mail; if not, please return to us the stamps which are not connected with it, nor embraced in the notice.

We send a more formal revocation of power confirmatory of former ones. We wish to act with the nicest sense of honor & equity to all in this matter, but do not wish to be defrauded by any under-hand game of Mr. Stitt. Please let us hear from you.

Respectfully yours,

A. & F. W. HUIDEKOPER.

We, the undersigned, confirming our former revocation by telegram and letter, do hereby recall from the possession of Messrs. Drake Bro's, of New York, a deed to William Stitt, for 1,288 acres of land in Al-

legheny Township, Venango County, Pennsylvania, recalling and revoking, & confirming our previous revocation of every real or supposed power on the part of Messrs. Drake to deliver said deed to the said Stitt any terms or conditions whatsoever, the said deed representing no existing agreement between us and the said Stitt, and we do authorize and request the said Messrs. Drake to return the deed aforesaid to us.

Jan'y 30, 1865.

A. HUIDEKOPER. [SEAL.]
A. HUIDEKOPER, [SEAL.]
F. W. HUIDEKOPER, [SEAL.]
Executors of Edgar Huidekoper, dec'd.

[5 cts. U. S. stamp cancelled.]

251 EXHIBIT "K."—C. N., *Com'r.*

MEADVILLE, *Feb'y* 4, 1865.

Messrs. DRAKE BRO'S, NEW YORK.

GENT'M: We are in receipt of your favor of the 1st, and regret, as simplif'ing matters, that you did not feel at liberty to return to us the deed in question. We meant, of course, in asking for it to save you harmless from all legal responsibility for so doing, and we much regret if you should have trouble or perplexity for your kindness in the custody of our papers. We will take counsel and determine what to do in the matter, considering your power to act for delivery as cancelled by our telegram and letters, if any ever existed, as we did not so understand it without an express order by letter from us.

Y'rs,

A. & F. W. HUIDEKOPER.

MAY 16, 1866. W. D.

252 EXHIBIT "*L.*"—C. N., *Com'r.*

MEADVILLE, PA., *Feb'y* 25, 1865.

Messrs. DRAKE BRO'S, NEW YORK.

GENTLEMEN: Please deliver to our attorneys, Messrs. Emerson & Prichard, of New York, the unstamped deed in your hands purporting to be between Alfred Huidekoper and wife, and Alfred Huidekoper & Frederick W. Huidekoper, executors of Edgar Huidekoper, of the first part, and W'm Stitt, of the second part, for 1,287 acres of land in Allegheny Township, Venango County, Pennsylvania, and touching which we lately sent to you revocation of power, &c., and our attorneys will receipt to you for same.

ALFRED HUIDEKOPER.
ALFRED HUIDEKOPER,
FREDERICK W. HUIDEKOPER,
Ex'c'r of Edgar Huidekoper.

MAY 16, 1866. W. D.

253 EXHIBIT "M."—C. N., *Com'r.*

NEW YORK, *Jan'y* 27, 1865.

Messrs. DRAKE BRO'S, *Brokers,*
No. 23 William st., New York.

GENTLEMEN: You will please take notice that the deed left in your possession by the Messrs. Huidekopers, of Meadville, Pa., conveying to

me certain lands in Allegheny Township, Venango Co., Pa., amounting to about twelve hundred and eighty-eight acres, is my property, that I am now ready and willing to pay all dues or demands remaining against said deed or lands, and will hold myself at all times in readiness to pay the same whenever demanded. You will therefore retain said deed in your possession as my property and will not deliver the same to any except myself or upon my order in writing. Of all of the above you will please take due notice.

WILLIAM STITT.

Attest:
G. H. WATSON.
K. MARSHALL.

MAY 16, 1866. W. D.

[U. S. stamp cancelled.]

Copy of mem'd on back: W. Stitt, notice of deed, &c. Jan'y 27, 1865.

254 EXHIBIT "N."—C. N., *Com'r.*

Brief of title of lands of Alfred Huidekoper and Edgar Huidekoper's estate in Venango County, Pa., Allegheny Township.

The patents for the following tracts are in the office of A. & E. Huidekoper, at Meadville, and are recorded in Harrisburg as follows, viz: Patent for—

Tr.	124	rec.	in	patent-book	No.	37,	page	152,	April	22,	1799.
"	162	"	"	"	"	38,	"	234,	"	30,	"
"	165	"	"	"	"	38,	"	233,	"	30,	"
"	171	"	"	"	"	38,	"	136,	"	29,	"
"	172	"	"	"	"	37,	"	147,	"	22,	"
"	208	"	"	"	"	37,	"	282,	"	30,	"
"	213	"	"	"	"	38,	"	76,	"	12,	"
"	223	"	"	"	"	38,	"	78,	"	12,	"
"	224	"	"	"	"	37,	"	144,	"	22,	"
"	225	"	"	"	"	37,	"	84,	"	18,	"

The above-described patents were issued to William Willenk & others, (Holland Land Company.)

Tract 172 was deeded by Willink et al. to Harm Jan Huidekoper by deed dated the twenty-third day of December, A. D. 1839, recorded in Venango County, in deed-book "L," pages 100, &c., May 11, 1848. In Crawfor' County, in deed-book U, pages 245, 246, & 247.

Will of H. J. Huidekoper, appointing Alfred and Edgar Huidekoper his executors, with power for them or the senior of them to sell, recorded in Crawford County, in book C, pages 25 & 26, June 1st, 1854.

255 Tracts Nos. 124, 162, 165, 171, 208, 213, 223, 224, & 225 were conveyed by W'm Willink et al. to Maurice Wirts by deed dated Feb'y 14, 1820, recorded in Crawford County, in book H, pages 440, 441, 442, & 443.

Then deeded by Maurice Wirts to Alfred and Edgar Huidekoper by deed, recorded in Crawford County, in deed-book D, No. 2, page 437 & 438, May 23, 1851.

Will of Edgar Huidekoper, appointing Alfred and Frederick W. Huidekoper his executors, with power to sell, recorded in Crawford County, in book C, pages 401, 402, & 403, Sept. 15th, 1862.

The above is a correct abstract of title of the lands therein specified.

A. HUIDEKOPER, *Att'y.*

MEADVILLE, *Jan'y 16th*, 1865.

256 *Points submitted by counsel for defendants.*

WILLIAM STITT
vs.
A. AND F. W. HUIDEKOPER. } No. 41. May term, 1867.

The court is respectfully requested to charge the jury:

1st. That an agreement was entered into by the defendants as alleged by the plaintiff, about the last of August or the beginning of September, 1864, upon the footing of a memorandum in writing, endorsed by them upon a map of their lands in the county of Venango, to the effect that, in case the pl'ff should procure a purchaser therefor within a limited time, at the rate of $30 per acre, he was to receive therefor the sum of $2,500 in recompense for his services therein; and, upon his admitted failure to accomplish the object within the time, although extended for another month or thereabouts, a new arrangement was made at his instance whereby a deed was to be deposited as an escrow with
Jay Cooke & Co., of Philadelphia, to be delivered to the plaintiff
257 on the payment by him of $40,000, being the consideration-money recited therein, the previous agreement was suspended thereby and the pl'ff would be entitled to no compensation whatever for any labor bestowed or expenses incurred by him in the abortive effort to effect a sale. (Coffin vs. Landis, 10 Wright 426; Picket vs. Badger, 37 Eng. L. & Eq. Reps., 428.)

Yes.

2nd. That the defendants, in order to facilitate any negotiations upon which the plaintiff might enter with third persons for the sale of the said lands, agreed to deposit a deed therefor in the hands of said Jay Cooke & Co. or any other persons, purporting to convey the same to pl'ff for the consideration of $40,000.00, as aforesaid, to be delivered only on the payment by him of the consideration-money therein named, subject to a drawback of $2,500, to be afterwards allowed by themselves, and reserving no interest to themselves out of any excess that the plaintiff might realize out of a sale thereof, refusing at the same
time to designate any specific period for which the said deposit
258 should continue, and the deed was so lodged as agreed upon. The transaction referred to imparted no hiring or employment as is charged in the plaintiff's declaration, so as to impose on him any legal obligation to bestow his labor or expend his money in effecting a sale of the said lands nor any more than a mere privilege of refusal thereof, at the price indicated; and being without consideration in the absence of any corresponding agreement on his part to purchase or pay for the same was a mere nudum pactum, and as such revocable by the withdrawal of the deed at any time before the actual payment or tender of the consideration-money mentioned therein. (Bean vs. Burbank, 4 Shep., 458; Cook vs. Oxley, 3 Term R., 654, 163, 45; Burnett vs. Bisco, 4 Johns, 235; Tucker vs. Woods, 12 Johns, 190; Darsey vs. Lockwood, 12 How., 126.)

Yes.

3rd. That, even supposing the said transaction to have imparted a
hiring or employment of the plaintiff without any stipulation as
259 to the terms of its continuance, it was equally revocable at the pleasure of the defendants, even without notice to him, at any time before payment or tender of consideration-money, without liability to him, upon the footing of any labor or expenditure incurred in the unsuccessful effort to effect a sale within the meaning of the agreement

by the realization and application of so much of the purchase-money, as was required to entitle him to the delivery of the deed. (Coffin vs. Landis, 10 Wright, 426.)

Rather too broad.

4th. That if the plaintiff did hold, by construction of law upon the facts already stated, and as claimed by his own testimony, the relation of agent to the defendants for the sale of the lands in question, the agreement in writing made by him with Backus and Morse, (pro ut,) being in his own name, without any reference to or recognition of his alleged principals, for a merely prospective and contingent sale of either a part or the whole of the lands at the election of the purchasers, for a price to be paid to himself, and widely variant from that which
260 was to be paid by him, stipulating for a conditional deposit of a part of the purchase-money to await the examination of the title, and to be forfeited, in virtue of the receipt indorsed on the agreement in presence of the parties, (pro ut,) to his own use in case of a default, and allowing a credit of sixty days after the payment thereof, in case the title should prove satisfactory, for the residue, without any communication of the terms of the said contract to the real owners, whom he now claims to have represented, if not a clear disaffirmance on his own part of the existence of any such relation to the defendants, was not such an execution of any power to sell, which can be legally inferred from the agreement shown as would bind his supposed principals or entitle him to compensation for his services in that capacity. (Sugden on Vendors, 251, 252; Hight vs. Bollard, 4 Russ., 298; 1 John's Ch. Rep., 273, 282; Boid vs. Jackson, Balt. Daily Law Transcript of July 10, 1869; 3 Hill's R., 273; Story on Agency, secs. 147–154, 160–165.)

Yes.

5th. That a mere executory and contingent contract, such as
261 that shown by the plaintiff as having been entered into between himself and the said Backus and Morse, (pro ut,) would not in any aspect of the case, and more particularly before the same had become absolute as between the parties by the satisfaction of all its conditions, constitute an actual sale of the lands in question within the meaning of the agreement between the parties to this suit, in view of the condition of payment before delivery, on which the deed was expressly deposited with Drake, Bros. & Co., so as to tie up the hands of the defendants for sixty days without any assurance that the money would ever be paid, or any remedy whatever against the purchasers in case of a default, or to entitle the plaintiff to any compensation as upon a sale effected and accomplished within the meaning of the agreement. (Balt. Legal Journal, supra 3 Hill, 273; Story on Agency, sec. 165.)

Yes.

6th. That if the defendants were not concluded by the agreement between the plaintiff & Backus & Morse for any of the reasons
262 above suggested, the mere furnishing an abstract of title to the depositaries along with the deed, upon general information from the pl'ff of a contract of sale and deposit of money, and without any notice whatever of the parties or terms thereof, which abstract never came into the hands of either the plaintiff or the purchasers, could not so alter the relations of the parties as to impair the right of the defendants to withdraw the papers at any time before the title was approved or the consideration-money paid or tendered; and the law would be the same as to any acts or declarations of either of the defendants

done or made in ignorance of the material facts connected with the said alleged contract of sale. (Owings vs. Hall, 9 Peters, 607.)

Yes.

7th. That the acts & declarations of the defendant Frederick Huidekoper are at all events not evidence to charge his co-defendant in this suit where the subject-matter is real estate; and the title to more than a moiety thereof is shown to have been vested exclusively in Al-
263 fred Huidekoper, and this whether the said Frederick has acted or been recognized by him generally as agent or partner in his professional or commercial dealings, or not. (Story on Agency, sec. 39; McCready vs. Friedley, 3 Rowle, 251; Com. Dig., Estates, K, 1-6.)

8th. That even if, in the opinion of the court, the parol agreement of the defendants to make a deed to the plaintiff upon the payment of $40,000, was founded on sufficient consideration to make it obligatory on the defendants, and the executory contract made with Backus and Morse was, under the circumstances already stated, such a sale within the meaning of the agreement between the parties hereto, as would have entitled the plaintiff to a conveyance aside from the statute of frauds, the remedy would be upon the special contract only, suit upon any alleged hiring and agency, and the measure of damages upon a breach thereof by a refusal to convey on tender of the purchase-money,
264 would be, not the value of the lands, or of the bargain in any supposed profits that the pl'ff might have realized therefrom, but only the amount of the consideration actually paid out on the hypothesis of a sale or the actual value of the services in case of agency. (Hartzog vs. Hartzog, 10 Casey, 418; Dumars vs. Miller, 10 Casey, 319; Graham vs. Graham, 10 Casey, 475; McNair vs. Crumpton, 11 Casey, 23; Pickett vs. Badger, 37 Eng. Law & Eq. Rep., 428.)

St. of frauds nothing to with the case.

9th. That if the pl'ff has failed to make out a case upon the special contract on which he has declared, which would entitle him to recover, either through a failure to perform on his own part acccording to its terms, or in consequence of the exercise by the defendants of a legal right on their part, to withdraw or countermand the delivery of their deed, no contract can be emplied to pay him for his time or labor or expenditures voluntarily bestowed on the endeavors to find a purchaser, in view of the admitted fact that he was not to be paid for either
265 or to received anyanything at all unless he sold the lands, & paid over the money according to agreement.

THO'S WILLIAMS,
Att'y for Def'ts.

(Indorsed;) Def'ts points.

266 *Charge to the jury.*

Circuit court western district of Pa.

STITT
vs.
HUIDEKOPER.

The trial of this cause has occupied very considerable time, though not perhaps than ought to have been expected considering the peculiarities of the case, and the amount of evidence submitted. The trial has been conducted with earnestness and ability upon both sides. What is supposed to be the law of the case has been fully discussed, and the ev-

idence has been as thoroughly commented upon as the counsel have deemed desirable. Upon neither side have the counsel reason to reproach themselves for a failure to discharge their whole duty. It now remains for you to perform your duty, with a conscientious regard to the law and the evidence.

It happens in this case as it often happens that a large part of the evidence has but a remote bearing upon the real merits of the controversy between the parties. It will be your duty, however, to bear in mind all the evidence laid before you, as well the oral testimony as the written exhibits, and to consider it all, so far as in your judgment it tends to show what are the important facts, involved in the controversy.

The evidence is for you—its credibility—its consistency—its weight—what it is, and what it proves. If there is a conflict in the testimony,
you are to consider it and when it is impossible to reconcile dif-
267 ferent statements of witnesses, you are to determine conscien-
ciously—not arbitrarily, which you will believe. You are not to know the parties, or yield at all to what you may have heard respecting the case outside of the jury box. The questions for you are, what does the evidence prove, and these, under the instructions of the court, what is the law in regard to the facts proven. At the outset it is indispensable that you should have a clear understanding of what the case is you are called upon to try. I will state it to you as set forth in the plaintiff's declaration, or statement of his cause of action. But first it may be well to notice what the case is not.

1st. It is not an action brought to enforce a contract for the sale of lands; that it is not an action between a vendor and vendee. 2. Nor is it an action brought to recover damages for a breach of a contract to sell lands. 3. Nor is it brought to recover damages because the defendants did not deliver to the plaintiff, or permit to be delivered to him, the deed first deposited with Jay Cook & Co., and afterwards with Drake Bro's. But it is an action to recover compensation for services which the plaintiff claims to have rendered the defendants in selling for them a body of lands, or negotiating a sale for them, when he was acting as their agent under a special agreement.

The plaintiff claims that, in the fall, or late in the summer of
268 1864, (say August or Sept.,) the defendants employed him to sell
for them, or negotiate and consum'ate a sale for them of a body of lands for the price of $40,000.00 or more, agreeing to pay him $2,500.00 out of the purchase-money, in case he made a sale, and also agreeing to allow him all he might sell the lands for more than $40,000.00. According to his claim, his compensation was to be dependent entirely upon his success in making a sale according to the authority given him.

Such is the contract which the plaintiff alleges to have been made between the parties. He then proceeds to allege performance on his part. He alleges that, in pursuance of this agency or hiring, he did, on the 10th of Jan'y, 1865, negotiate and effect a sale of the lands to Backus & Morse for the sum of $70,840.00, and entered into a contract of sale with them; but that the defendants refused to carry out their agreement, and thereby became liable to pay to him the stipulated sum of $2,500, and also all that the price he agreed to sell to Backus & Morse for exceeded the sum of $40,000.00. There is more in the declaration to which I may have occasion hereafter to call your attention. At present let us look at the claim, as the plaintiff has made it. It is then a claim for compensation for services rendered and expenses incurred while acting under a special agency, compensation wholly contingent

upon the plaintiff's accomplishing a sale in accordance with his
269 authority. Now, what are the facts proved? There is, it seems to me, very little dispute in regard to them. There is dispute respecting their legal effect, and in regard to that I will instruct you hereafter. But in respect to the facts themselves, there is, except in two or three particulars, great harmony in the testimony, at least it so appears to me; but this is wholly for your decision. You are to determine whether the testimony is harmonious or conflicting. Up to the 19th–22nd of Nov'r, 1864, I discover no difference of importance between the accounts given of the transactions between the parties by the plaintiff and the defendants.

(Here reference was made to the testimony of the pl'ff, and to that of the defendants, respecting what took place in August, Sept., & Oct., 1864.)

It has not been claimed, and certainly it cannot be, that all rights the plaintiff had under the first arrangement, that of Aug., 1864, did not expire with the thirty days within which he was authorized to sell, or certainly when he reported to the defendants that he had failed to sell. And as his compensation was contingent upon his success, he had then no legal claim for compensation for his labor or his expenditures. Look next at the new arrangement, or the modification of the first, made Nov. 19–22. It is not important to inquire whether it was a new bargain or a modification of the one which had expired.

270 (Here the testimony of the witnesses as to what took place between the parties on the 19th and 22 of Nov'r was referred to and recited.) Stop here a moment, gentlemen, to consider the effect of this new or modified arrangement.

1. On its face it was giving the refusal of the land to Mr. Stitt for the price of $40,000.00. It was a continuous offer until withdrawn.

2. Stitt was not bound to take the land at the price. He did not agree to take it, and it is not claimed that he assumed any obligation.

3. Unless there was an agreement to the contrary, the defendants had a right to withdraw their offer at any time, and decline to allow the deed to be delivered.

4. If Stitt had paid the $40,000 before the offer was withdrawn, the land would have been his. He would have been entitled to the deed, and had he then sold the land, he would have been entitled to all he got for it, without accountability to defendants. I have said the arrangement, on its face, would seem to have been giving to the plaintiff an option to buy the lands at the price named, with an agreement that if he did the defendants would refund $2,500.00, but Stitt would not be bound to buy.

It may be, however, it probably was, the fact, (though this is for you,) that it was in contemplation of the parties: Stitt might find some purchaser from himself who would take a deed from him, and that
271 thus, or out of such sale the $40,000.00 would be paid to the defendants, or to Jay Cook & Co. for them. It may, therefore, have been, as the plaintiff contends, a mode devised for a pos'ible transmission of title. This is for you. But I give it to you as matter of law, that, in the absence of any agreement to the contrary, the defendants had a legal right to withdraw the deed and terminate the arrangement at any time before the $40,000.00 were paid in cash to Jay Cook & Co. And, gentlemen, the deed and the accompanying letter to Jay Cook & Co., gave no authority to the plaintiff, or had any legal effect, as a contract between him and the defendants, so long as the deed remained in escrow, undelivered to him, and so long as the price, $40,000 remained

unpaid. His authority to sell for the defendants was by virtue of the parol contract, made or modified when the deed was executed and put in escrow. A deed in escrow is not a contract between the grantor and grantee. It becomes a contract only when delivered. Some evidence has been given respecting the letter to Jay Cooke & Co. I do not think it of much importance. The letter is dated Nov'r 27. Mr. A. Huidekoper says that is a mistaken date; that it was written & sent on the 22nd, and that it was copied in their letter-book. You have the letter-book containing a copy between letter dated Nov'r 21 & Nov. 23. It is for you to say how this is. Two experts have sworn they think the letter was never copied. You have heard their reasons for their opinions. I think you will probably conclude they are mistaken.

272 Nothing was to be gained by establishing that the letter was written on the 27th rather than the 22nd, and the plaintiff himself testifies that a letter was written on the day when the deed was executed. (Nov. 22,) though he does not say that it was included in the envelope with the deed. I refer to this only, gentlemen, because it is an attempt to impeach the honesty of the defendant, unsuccessful, in my opinion, though the matter is wholly for you. I do not perceive that it makes any difference whether the letter was written on the 27th or the 22nd. In regard to the arrangement of Nov'r 19—22nd, there is a discrepancy between the testimony of the plaintiff and that of the defendants. Mr. Stitt testifies that he asked to have a time fixed during which he might operate to sell the lands, and that Mr. Alfred Huidekoper declined, stating it was better for him no time should be fixed. On the other hand, both the defendants testify that two papers were drawn and signed by them both, one fixing the time until Dec'r 1st, and the other agreeing to refund $2,500.00 if the pl'ff took up the deed. These papers they say were delivered to the plaintiff. Of this A. Huidekoper is positive, and F. W. thinks they were delivered. A call has been made for these papers, and they have not been produced. Were any such papers given? You shoul' reconcile the testimony, if possible, without imputing falsehood to either affiant. It is a rule of presumptions that ordinarily a witness who testifies to an affirmative is

273 to be preferred to one who testifies to a negative. Why? It is because he who testifies to a negative may have forgotton. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed. If such papers were given—if such was the contract, the plaintiff's right to take up the deed on the payment of $40,000.00 and his agency to sell the lands for the defendants expired on the 1st of Dec'r, 1864; and as his bargain was contingent, he had thereafter no legal claim against the defendants for what he had done, or expended, and no right to act as their agent farther, unless there was a new contract, of which I shall have something to say presently. But this is not a very important matter. If you should find there was no such limitation, still the defendants had a legal right to withdraw their deed, and put an end to the agency at any time they chose, without the plaintiff having any legal right to complain. If Mr. Alfred Huidekoper and Mr. F. W. Huidekoper are to be believed, the deed was directed to be withdrawn. F. W. Huidekoper went to New York about the close of November. There he met Judge Casey, with whom the plaintiff had some negotiations. In consequence of what took place at this interview the deed was taken from Jay Cook & Co., Dec'r 1st, and deposited with Drake Bro's, with instructions to allow Judge Casey to see it. I remember no other instructions given, but you are to determine what has been proved. It is in evidence that Frederick

W. Huidekoper said to Casey, Stitt might have time to carry out
274 the proposed arrangement, and until he gave notice that it had failed. Did this refer to the negotiation in which Casey was then engaged? That failed about Dec'r 15, 1864. Was there an agreement to allow to Stitt a refusal of the lands indefinitely? Is this probable, considering the fluctuating value of lands in the oil region? Did Alfred Huidekoper, agree to give such a perpetual or indefinite refusal. This is a suit upon an alleged joint contract, and both defendants must be liable or neither is. The evidence seems to show, (though this is for you,) that Casey's attempt to sell failed by about the middle of Dec'r, 1864, and he gave notice that he could effect no sale. About this time the letter to Simeon E. Church was written, which certainly shows that the defendants still treated the plaintiff as their agent to effect a sale of the lands or if not their agent as having a right to become a purchaser by the payment of the $40,000.00. If the contract terminated Dec'r, 1864, unless you believe that it was renewed or extended or that a new contract was made, what the plaintiff did after that time, was without authority from the defendants, and at most permissive. If the contract did not expire Dec'r 1, or if it was tacitly or expressly continued, the defendants had still a right to terminate it, without liability to the plaintiff,
at any time before he took up the deed, or effected a bona-fide
275 sale for cash. It is not claimed nor can it be, that the contract gave him a right to sell as agent of the defendants on credit. He could only make a cash sale. I discover not a word in the evidence that looked at any other sale than one for cash, and there is a wide difference between a sale for cash, and one on credit. The latter may create an equitable interest that may require long time for its extinguishment, and yet may embarrass the legal owner, and interfere with his powers to sell. Pass on now, gentlemen, to the transactions of Jan'y 10, 1865, which the plaintiff claims to have been a performance on his part of the contract entitling him to the specified compensation for his services.

(Here the Backus & Morse contract was read.)

Observe this contract was in Stitt's name; it makes no reference to the defendants as his principals. Did the plaintiff enter into that contract as an agent for the defendants or in his own right, expecting to take up the deed. Observe the price was made payable to himself, not to his principals. The forfeiture in case of failure of Backus and Morse was to him. It was not a cash sale. It is true that under a cash sale the purchaser has a right to time for the examination of the titles, but here the purchase-money was not payable until sixty days after the title had been examined. Now the $10,000.00 were only to be deposited. They were not to be paid over until after the title was examined, and the remainder was payable sixty days thereafter. Again Backus & Morse
were not bound to take the property. They obtained a refusal
276 without liability for the whole purchase-money except at their option. Again they had an election to take part of the lands, rejecting the remainder. It is not pretended Stitt had any authority to make any sale. Still further, the contract was not in duplicate. Stitt had no copy & none was deposited anywhere. Stitt himself had no power of enforcing the payment of the price named for the lands in the event that Backus & Morse concluded to take them without money; and you will observe, gentlemen, that on the 14th of Jan'y, 1865, when the $10,000.00 were paid, & when it is said Buckus & Morse closed the contract, and elected to take the whole body of the lands, we have no proof of such election except parol. Backus & Morse did not sign the election. It was signed by Drake, & Backus was not present. I in-

struct you, therefore, that the arrangement with Backus & Morse, was not such a sale as the plaintiff, under the contract set out in his declaration, had a right to make; that it was not binding on the defendants, and that they were under no obligations to accept it. Notwithstanding that contract, they had a clear right to withdraw their deed from Drake Bro's, or to prohibit its delivery, and refuse to continue the plaintiff's agency. Nor is there any evidence of ratification that would justify you in finding that the defendants did ratify the bargain made by the plaintiff with Backus & Morse. Knowledge is essential to ratification. A man cannot be held to ratify that which he does not know. What evidence is there that the defendants were informed of the nature and
277 stipulations of the contract of Jan'y 10th, before they revoked the authority of Drake Bro's, if any they ever had, to deliver the deed. It is not pretended that they had any such information. On the 14th of January, Stitt wrote them that he had sold the lands, and that $10,000.00 were paid. He says he did not mention the terms of the sale. He did not say it was no sale for cash, or that it was a refusal given to the purchasers without liability on their part to pay the whole purchase-money. He did not say what the price was. He did not name the purchasers. Now if he made the sale as agent of the defendant', his duty was plain. It was to inform them at once of all he had done. Instead of this, you may be of the opinion that he concealed from them what they had a right to know. He gave them no copy of the contract, and they were left uninformed in regard to its contents, until after they concluded to revoke the plaintiff's authority, and resume the control of their deed. Under these circumstances, the declaration of F. W. Huidekoper to Sam'l Q. Brown, and the sending of an abstract of title to Drake Bro's, ought not to be treated as an assent to or ratification of an agreement of which the defendants had no particular knowledge, and which it was impossible for them to obtain; especially is this true when he who attempts to show ratification is the person whose duty it was to give the defendants full information, and to furnish them with a copy of the contract he had made while claiming to be acting as their agent.

278 You will not overlook the evidence that the plaintiff admitted he had transcended his authority upon this subject. I call your attention to the testimony of Henry Huidekoper, Alfred Huidekoper, and Mr. Zane.

Pass on now, gentlemen, to Jan'y 24, 1865. On that day the defendants revoked the authority of Drake Bro's, if any they had, to deliver the deed.

I instruct you, gentlemen, they had a legal right to make the revocation; and, further, the defendants were executors, and trustees of the lands. It was their duty to obtain the highest possible price for them. When the discovery of the United States well, or any other thing gave to the property an enhanced price in the market, it was their duty as well as their right, unless they were restrained by some previous contract, to withdraw any refusal they had given, that interfered with their power to make a sale most beneficial to their cestui que trust.

The revocation of the power to deliver the deed, if you believe it was made, put an end to the plaintiff's right to take the lands under the special arrangement with the defendants, and in effect terminated his agency. The subsequent tenders, even if made in good faith, and kept alive, were therefore of no effect; and you need not trouble yourselves to consider them. But whether the revocation of Drake Bro's authority to deliver the deed, did or did not terminate the special agency of
279 the plaintiff, is perhaps not necessary to be decided, for what is

claimed by the plaintiff is that, as a special agent for the defendants, he made a sale of the lands, and it is therefore a question whether he did negotiate a sale as their agent, such as they empowered him to make.

I need say nothing more to you respecting the case. Numerous points have been presented to me which it would serve no good purpose for me to answer in detail. It would rather tend to confuse your minds and draw away your attention from what I consider the vital questions of the case. In regard to them I will say that, so far as I have not affirmed them, they may be considered as denied. The great and controlling question is whether the plaintiff made such a sale, or rather, whether the contract made by him with Backus & Morse was such a sale or negotiation of a sale, as the plaintiff under his agency for the defendants, as set forth in the declaration, and proved here at the trial, had authority to negotiate. If it was not, and I have instructed you that it was not, the defendants had a legal right to refuse to accept it and to withdraw all authority they had given, and if you believe they did so your verdict should be for the defendants.

To this charge the plaintiff excepted before verdict, and prayed that this his bill of exceptions might be sealed; which is accordingly done this May 16, 1871.

W. STRONG, [L. S.]

280 PITTSBURGH, *May* 16, '71.

WILLIAM STITT
vs.
A. & F. W. HUIDEKOPER.

We the undersigned jurors in the above case do hereby declare our verdict in favor of the defendants.

J. P. TAYLOR.	SAM'L R. MOORE.
H. W. LANE.	J. K. MCCONAHEY.
F. E. JAYNE.	ROB'T CARNAHAN.
J. R. MCLAIN.	BENJ. K. CRAIG.
THOMAS STEWART.	ELIAS RADCLIFFE.
W'M MOOREHEAD.	F. SCHNEIDER.

281 WILLIAM STITT, PLAINTIFF IN ERROR and plaintiff below,
vs.
ALbert HUIDEKOPER AND FREDERICK W. Huidekoper, defendants in error and defendants below. } No. December. 1871.

MAY 17, 1871.

Issue writ of error in No. 41, May T., 1867.

JAMES K. KERR,
Att'y for Pl'ff.

To H. D. GAMBLE,
Clerk of the Circuit Court U. S., West. Dist. Pa.

282 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the circuit court of the United States for the western district of Pennsylvania, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you, between William Stitt, a citizen of the State of New Jersey, plaintiff, and Alfred

Huidekoper and Frederick W. Huidekoper, citizens of the State of Penna., defendants, a manifest error hath happened to the great damage of the said William Stitt, as by his complaint appears, and it being fit that error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the
283 same at the city of Washington, on the first Monday of December next, A. D. 1871, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the United States Supreme Court, this 18th day of May, A. D. 1871.

[SEAL.] H. D. GAMBLE,
Clk U. S. C't Court.

Allowed by—

W. STRONG, *J.*

(Indorsed:) No. 41. May 1, 1867. William Stitt vs. A. & F. W. Huidekoper. Writ of error.

284 UNITED STATES OF AMERICA *ss:*

To Alfred Huidekoper and Frederick W. Huidekoper, citizens of Pennsylvania, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, A. D. 1871, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for said district, wherein William Stitt, a citizen of New Jersey, is plaintiff in error, and Alfred Huidekoper and Frederick W. Huidekoper are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff, as in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness my hand this 18th day of May, A. D. 1871.

[SEAL.] W. STRONG, *J.*

(Indorsed:) No. 41. May T., 1867. William Stitt vs. A. & F. W. Huidekoper. Citation.

Service of copy accepted, July 13, 1871.

L. W. & A. S. BELL,
Att'ys for Defendants.

Marshal' M., $5.

285 In the circuit court of the United States for the west. dist. of Pennsylvania.

WILLIAM STITT, A CITIZEN OF THE STATE OF New Jersey, plaintiff in error,
vs.
ALFRED HUIDEKOPER AND FREDERICK W. Huidekoper, citizens of the State of Pennsylvania, defendants in error.

Action of trespass on the case. No. 41. May term, 1867.

BILL OF EXCEPTIONS.

Be it remembered that, on the 17th day of May, 1867, an action of trespass on the case was brought in the United States circuit court for the western district of Pennsylvania to No. 41, May term, 1867, by William Stitt, a citizen of the State of New Jersey, against Alfred Huidekoper and Frederick W. Huidekoper, citizens of the State of Pennsylvania, in which the plaintiff sought to recover from the defendants thirty-three thousand three hundred and forty dollars, ($33,340,) with interest from March 15, 1865, being damages sustained by plaintiff, by reason of defendants' breach of a certain contract of em-
286 ployment by said defendants of plaintiff to sell for them certain lands in Venango County, Pennsylvania, to wit, 1,288 acres. The original writ was made returnable to the Monday of , A. D. 1867; narr. filed 17 May, 1867; amended narr. filed, with leave of court, 19th February, 1869; common counts added, with leave of court, 10th May, 1871.

Trial.

And be it also remembered that, at the May term of said court, to wit, on the 9th day of May, A. D. 1871, before the Honorable William Strong, an associate justice of the Supreme Court of the United States, holding said circuit court at Pittsburgh, in said district, the parties to said cause were at issue on the following pleas:

1st. That they (defendants) never employed plaintiff in any capacity, as alleged by him in his declaration.

2nd. That they (defendants) never entered into any agreement with plaintiff, as he alleges in his declaration.

3rd. That they (defendants) are not indebted to plaintiff in manner and form, as alleged by him in his declaration.

287 *Evidence*

And being so thereof at issue as aforesaid, a jury being called and sworn, the following evidence was offered by plaintiff to maintain the issue on his part, and received.

1st. Testimony of William Stitt, plaintiff, (vide notes of trial.)

Plaintiff having offered the copy of the abstract of title, dated 16th January, 1865, as proven by the plaintiff, defendants object to the admission of copy, and offer to produce, under plaintiff's notice, what defendants allege to be the original, and thereupon produce the same. The plaintiff denies that the paper produced is the original, and propose to prove by William Stitt that the said paper is not the original

Objection.—To which offer defendants' counsel objected that the original produced on notice is the best and only evidence; that it is not competent to the plaintiff to refuse it on his own allegation that it is

not the original, and thereupon, and in its presence and upon the
288 footing of his own denial to introduce secondary evidence of the paper in question.

Judgment.—The defendants being in court and ready to be examined to prove that the paper produced is the original, and the plaintiff declining to examine them, the court did thereupon sustain the said objection and reject the said evidence.

Exception.—To which said judgment of said court, plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Agreement of Jan. 10, 1865, rec'd in evidence. (Pro ut same.)
2. Testimony of Cyrus Tabor, (vide notes of trial.)
3rd. Deposition of Judge Joseph Casey, (vide depositions.)
4th. Deposition of Jared C. Marcey, (vide deposition.)
5th. William Stitt recalled—

289 Plaintiff offers to prove by the witness that, at the time the contract of 10 January, 1865, was made and signed by the parties, *that* Backus and Morse, the purchasers, claimed that they would reasonably require sixty days' time within which to examine the lands and the titles, owing to the distance from New York to Venango County, Penn'a, and the difficulty of having searches and examinations made by competent attorneys in Pennsylvania, on account of the great number of real-estate transactions in the oil regions; and that the sixty days' time allowed in the contract was a reasonable provision under the circumstances of the case; and that the plaintiff consented to that provision in the contract for the purpose of allowing the purchasers to examine the lands and to procure professional examinations of the titles to be made; and also to prove that, according to the usual course of business in that behalf, at that time, and under similar circumstances, the time given in said contract was reasonable; that it ordinarily required from thirty to sixty days to examine titles in Venango
290 County at that time; to be followed by several other witnesses on the same subject, some of whom are lawyers and professionally familiar with the situation at that time.

Objection.—To which offer defendants' counsel did then and there object.

Judgment.—Whereupon the said court did sustain the said objection and reject the said evidence.

Exception.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

6. Plaintiff offers to prove by witness, to be followed by other witnesses on the same subject, that when Venango County oil-lands were sold in the cities of Philadelphia or New York, during the winter of 1864-'5, it ordinarily required from thirty to sixty days to have a thorough professional examination of titles and liens made, when
291 there were several titles to be examined, and that w'ere any provision was made about the time for the examination of titles, that sixty days would not be an unreasonable period of time, taking into account the state and condition of the offices in which the records of titles and liens were kept and the amount of business in the hands of reasonable and competent attorneys in the oil regions, and other difficulties attending the examinations of titles.

Objection.—To which offer defendant's counsel did then and there object.

Judgment.—Whereupon the said court did sustain the said objection and reject the said evidence.

Exception.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

7. Plaintiff offers to prove by the witness, to be followed by Joseph Morse, jr., and Seth A. Backus, all the parties to the contract,
292 that when the contract was made, it was the intention and agreement of the parties to provide in the contract that the purchase-money should be paid as soon as the titles could reasonably be examined, and that it was a mutual mistake that the language of the contract was not made to express that understanding, and that the omission in the contract of such words as were necessary to clearly express that conclusion was a mutual mistake, such as ought to be corrected.

Objection.—To which offer defendant's counsel did then and there object.

Judgment.—Whereupon the said court did sustain the said objection and reject the said evidence.

Exception.—To which said judgment of said court plaintiff's counsel did then and there except and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

8. Deposition of William F. Drake (vide deposition.)
293 9. Deposition of S. E. Church, (vide deposition.)
10. Deposition of Samuel Q. Brown, (vide deposition.)
11. Deposition of Lewis Guerner, (vide deposition.)
12. Deposition of Stephen H. Thayer, (vide deposition.)
13. Deposition of Edward L. Halstead, (vide deposition.)
14. Copy of abstract of title dated 16 January, 1865, (vide notes of trial.)
15. Envelope containing deed and endorsement.
16. Endorsements on contract of 10 January, 1865.
17. Testimony of Joseph Morse, jr.
18. Notes of testimony of John W. Farraly.
19. Testimony of Seth A. Backus.
20. Testimony of F. F. A. Wilson.
21. Affidavit of defense.

The defendants, to maintain the issue on their part, offered the following evidence, which was received, to wit:

1. Testimony of Alfred Huidekoper, one of the defendants.
2. Testimony of John P. Zane.
294 3. Testimony of Henry Huidekoper.
4. Testimony of Jared C. Marcey.
5. Testimony of Kennedy Marshall.
6. Testimony of Alfred Huidekoper, one of the defendants, recalled.
7. Testimony of Kennedy Marshall, recalled.
8. Testimony of Clinton Cullum.
9. Testimony of Frederick W. Huidekoper, one of the defendants.
10. Testimony of James E. McFarland, sr.

Whereupon the plaintiff and defendants, having closed the testimony, the said plaintiff, by his counsel, did urge and insist that he, the said plaintiff, was entitled to have and maintain his action so as aforesaid brought, and was entitled to recover the full amount of damages so as aforesaid sustained by him, and asked the court to charge the jury as follows:

1st. This action is brought to recover from defendants damages arising by reason of a breach of contract of plaintiff by defendants, to sell lands for them, and is not within the statute of frauds & perjuries not prohibited by said statute.

295 *Judgment.*—Which said instruction the said court did then and there refuse and deny, except so far as affirmed in the general charge.

Exception.—To which said judgment of said court the plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said plaintiff asked the said court to charge the jury further as follows:

2nd. If the jury believe from the evidence that the defendants, by parol, authorized the plaintiff to sell the lands in question, and afterwards and before the sale, in order to clothe the plaintiff with authority or credit in dealing with strangers in regard to said lands, executed to him a deed for the said lands, and deposited the same with an agent selected by themselves in the market where the plaintiff was endeavouring to sell, and did sell, said lands, with instructions to show the same to the parties with whom the plaintiff was dealing in that behalf,

296 and by words and acts advised those who were dealing with plaintiff in relation to said lands of his authority without limitation as to time, and at the same time the said defendants had not a good title to said property, or were not in a condition, for any known reason, to convey a good title thereto to the purchasers thereof, through the plaintiff; and if, in pursuance of said authority, words, and acts of defendants, the plaintiff made the contract of 10th January, 1865, in good faith and with bona-fide parties, it was a fraud on the part of defendants, and the plaintiff is entitled to recover from the defendants, by reasons of said fraud, in this action, all the damages which he has sustained in consequence thereof, to wit, the loss of the bargain, which was the difference between $37,500 and the amount for which the plaintiff sold the land.

Judgment.—Which said instruction the said court did then and there refuse and deny, except so far as affirmed in the general charge.

W STRONG. [L. S.]

297 *Exception.*—To which said judgment of said court the plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said plaintiff asked the said court to charge the jury as follows:

"3rd. If the jury believe that the defendants had, and were able to convey through the plaintiff to the purchasers from him, a good title to the lands in question, and had clothed him with authority and credit to deal with strangers in relation to and sell the same, as stated in second point, and that the plaintiff sold the said lands by the agreement of

January 10th, 1865, to Backus and Morse, and after they were notified of the sale by plaintiff to said Backus and Morse, became satisfied that they could make more money by breaking than by fulfilling their agreement with plaintiff, refused to deliver or permit to be delivered the said deed to plaintiff, it was a fraud on their part, and rendered them
298 liable to plaintiff for the loss of the bargain, to wit, the difference between $37,500 and the amount for which the plaintiff had sold the land."

Judgment.—Which said instructions the said court did then and there deny, except so far as affirmed in the general charge.

Exception.—To which said judgment of said court the plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said plaintiff asked the said court to charge the said jury as follows:

"4th. If the jury find from the evidence that the defendants authorized plaintiff to sell the lands described in their deed in evidence in this case, without limitation as to time, and that in pursuance thereof the plaintiff, with reasonable diligence and bona-fide sold said lands by the contract of 10th January, 1865, to Backus and Morse, giv-
299 ing them from the date thereof as much time as was necessary to have the title examined, (not exceeding the time mentioned in said contract,) then the defendants could not, upon notice from the plaintiff of said sale, revoke his authority and defeat or interrupt the passage of the title from them to the *the* purchasers from plaintiff without liability to the plaintiff for any loss sustained by him by reason of their (defendants') acts."

Judgment.—Whereupon the said court did then and there refuse and deny the said instructions, except so far as affirmed in the general charge.

Exceptions.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon plaintiff's counsel asked the said court to charge the said jury as follows:

"5th. If the jury find from the evidence that an arrangement
300 was made as testified to by the plaintiff, he (the plaintiff) had the right in effecting such sale, to allow a reasonable time for the examination of the lands and their title before the payment of the purchaser-money, and the defendants could not for that reason repudiate the sale; and in determining whether the time allowed was reasonable, the jury will consider the location and amount of land sold, its distance from the place of sale, the amount of purchase-money agreed to be paid, the difficulty of having examinations and searches made at that time and place, and all other facts and circumstances proven in the cause."

Judgment.—Whereupon the said court did then and there refuse and deny the said instructions, except so far as affirmed in the general charge.

Exceptions.—To which judgment of the said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

301 Whereupon plaintiff's counsel asked the said court to charge the said jury as follows:

6th. If the jury find from the evidence that the defendants agreed by parol that, in case the plaintiff would procure the lands embraced by the deed in evidence to be sold, or would find a purchaser for the same at a price not less than $40,000, that then the said sale should be consummated, and they would allow the plaintiff all the purchase-money in excess of $37,500; and that, in pursuance of, and upon the faith of, such agreement the plaintiff expended his time and money in efforts to effect such sale, and did effect a sale in a manner substantially conformable to such agreement, and that the defendants subsequently refused to consum'ate the sale, by reason whereof the plaintiff was prevented from receiving his portion of the purchase-money from the purchasers, then the plaintiff is entitled to recover in this case the amount of money actually lost by him in consequence of the defendants' refusal to convey, viz, the difference between the contract price ($70,840) and the
302 amount reserved by defendants, ($37,500,) with interest, from the date of such refusal.

Judgment.—Whereupon the said court did then and there refuse and deny the said instructions, except so far as affirmed in the general charge.

Exceptions.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon plaintiff requested the said court to charge the said jury as follows:

7th. That there is no substantial difference between a permission given to a broker to sell and an agreement in parol to employ him to sell; and in either case, if the broker or agent on his part complies, it is the duty of his principal to pay the compensation agreed upon.

Judgment.—Whereupon the said court did then and there refuse and deny the said instructions, except so far as affirmed in the general charge.

Exceptions.—To which said judgment of said court plaintiff's
303 counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon plaintiff requested the said court to charge the said jury as follows:

8th. That it was the duty of defendants when advised of the sale by plaintiff as their agent or broker, if dissatisfied with the sale, promptly to disavow his acts and notify the broker; and in this case, if the jury believe from all the evidence that plaintiff did, on or about the 14th January, 1865, advise the defendants that he had sold, or, if they otherwise came to the knowledge of the fact, and, with such knowledge, furnished to the plaintiff, or to Drake Bro's, for the use of the purchasers, an abstract of the title to the lands, and by words advised the purchasers, or either of them, that the sale was all right, such acts, together with the acquiescence of the defendants until 24th January, 1865, a period of ten or eleven days, was such a recognition of the agent's authority and ratification of said sale so made by him as now to estop them from denying either his authority or performance on his

304 part, so far as affects his (the broker's or agent's) right to recover in this action?

Judgment.—Whereupon the said court did then and there refuse and deny the said instructions, except so far as affirmed in the general charge.

Exceptions.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the plaintiff's counsel did then and there request the said court to charge the said jury as follows:

11th. That, if the jury believe from the evidence that the power to sell given by the defendants to the plaintiff was without limitation as to time; or, if originally limit*at*ed, was subsequently expressly or impliedly freed from limitation by the acts of the defendants, or either of them, (with the concurrence or subsequent acquiescence of the other,) in that event the tender of $40,000 made by plaintiff to Drake
305 Bro's for defendants on the 27th January, 1865, in view of the contract of 10th January, 1865, was in time, and its validity could not be effected by the telegram of January 24, 1865.

Judgment.—Whereupon the said court did then and there refuse and deny the said instructions, except so far as affirmed in the general charge.

Exceptions.—To which judgment of said court, plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [SEAL.]

Whereupon the said plaintiff's counsel did request the said court to charge the said jury as follows:

"12th. If the jury believe from the evidence in the case that defendants, as stated in the foregoing points, authorized plaintiff to sell said lands, and in pursuance of said authority, the plaintiff did, by the agreement of January 10, 1865, sell the same in good faith to bona-fide parties who acted upon the faith of said authority, with full no-
306 tice of the same and the extent thereof, and were not advised of any limitations on the authority of said plaintiff as to time, examination of titles and land, &c., and the said contract was reasonable and fair in its terms, the said defendants are now estopped from denying the authority or limiting its extent by terms or conditions not coupled with the authority itself."

Judgment.—Whereupon the said court did then and there refuse and deny the said instructions, except so far as affirmed in the general charge.

Exception.—To which said judgment of said court, plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done. W. STRONG. [L. S.]

The court thereupon charged the jury as follows, (the par-
307 ticular parts of the charge excepted to being hereafter noted.)

Whereupon the said court did then and there further charge the said jury, in relation to the said action, in the following words, (inter alia:)

"Nor is it [the said action] brought to recover damages because the

defendant did not deliver to the plaintiff, or permit to be delivered to him, the deed first deposited with Jay Cooke & Co., and afterwards with Drake Bro's, but it is an action to recover compensation for services which the plaintiff claimed to have rendered the defendants in selling for them a body of land or negotiating a sale for them, when he was acting as their agent under a special agreement."

Exception.—To which said judgment of the said court, plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words:

"It has not been claimed, and certainly it cannot be, that all
308 rights the plaintiff had under the first arrangement, that of August, 1864, did not expire with the thirty days within which he was authorized to sell, or certainly when he reported to the defendants that he had failed to sell, and as his compensation was contingent upon his suc'ess he had then no legal claim for compensation for his labor or his expenditures."

Exception.—To which said judgment of the said court the plaintiff's attorneys did then and there except and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words:

"Unless there was an agreement to the contrary the defendants had a right to withdraw their offer at any time, and decline to allow the deed to be delivered."

Exceptions.—To which said judgment of the said court the plaintiff's attorneys did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

309 Whereupon the said court did then and there further charge the said jury in the following words:

"But I give it you as matter of law that, in the absence of any agreement to the contrary, the defendants had a legal right to withdraw the deed and terminate the arrangement at any time before the $40,000.00 were paid in cash to Jay Cooke & Co."

Exception.—To which said judgment of the said court plaintiff's attorney did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words:

"And, gentlemen, the deed and the accompanying letter to Jay Cooke & Co. gave no authority to the plaintiff, or had any legal effect as a contract between him and the defendants, so long as the deed remained in escrow, undelivered to him; and, so long as the price, $40,000.00, remained unpaid, his authority to sell for the defendants was, by
310 virtue of the parol contract, made or modified when the deed was executed and put in escrow. A deed in escrow is not a contract

between the grantor and grantee. It becomes a contract only when delivered."

Exception.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon, the said court did then and there further charge the said jury in the following words, "Some evidence has been given, respecting the letter to Jay Cooke & Co. I do not think it of much importance. The letter is dated Nov. 27. W. A. Huidekoper says that is a mistaken date; that it was written and sent on the 22nd, and that it was copied in their letter-book. You have the letter-book before you, containing a copy between letters dated Nov. 21 and Nov'r 23d. It is for you to say how this is. Two experts have sworn they think the letter was never copied. You have heard their reasons for their opinions. I
311 think you will probably conclude they are mistaken. Nothing was to be gained by establishing that the letter was written on the 27th rather than the 22nd, and the plaintiff himself testifies that a letter was written on the day when the deed was executed, (Nov. 22d,) though he does not say that it was included in the envelope with the deed. I refer to this only, gentlemen, because it is an attempt to impeach the honesty of the defendant; unsuccessful, in my opinion, though the matter is wholly for you. I do not perceive that it makes any difference whether the letter was written on the 27th or the 22nd."

Exception.—To which said judgment of the said court, plaintiff's attorneys did then and there except and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did there further charge the said jury in the following words:

312 "In regard to the arrangement of Nov. 19th–22nd, there is a discrepancy between the testimony of the plaintiff and that of the defendants. Mr. Stitt testifies that he asked to have a time fixed during which he might operate to sell the lands; and that Mr. Alfred Huidekoper declined, stating it was better for him no time should be fixed. On the other hand both the defendants testify that two papers were drawn and signed by them both, one fixing the time until Dec. 1st, and the other agreeing to refund $2,500.00 if the plaintiff took up the deed. These papers, they say, were delivered to the plaintiff; of this, A. Huidekoper is positive, and F. W. Huidekoper thinks they were delivered.

A call has been made for these papers, and they have not been produced.

Were any such papers given?

You should reconcile the testimony, if possible, without imputing falsehood to either affiant. It is a rule of presumptions that, ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative. Why? It is because he who testifies to a negative
313 may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed.

Exception.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S]

Whereupon the said court did then and there further charge the said jury in the following words:

"If such papers were given; if such was the contract, the plaintiff's right to take the deed on the payment of $40,000.00, and his agency to sell the lands for the defendants expired on the 1st of Dec., 1864, and as his bargain was contingent, he had thereafter no legal claim against the defendants for what he had done or expended, and no right to act as their agent farther unless there was a new contract, of which I shall have something to say presently."

Exception.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

314 Whereupon the said court did then and there further charge the said jury in the following words:

"But this is not a very important matter. If you should find there was no such limitation, still the defendants had a legal right to withdraw their deed, and put an end to the agency at any time they chose, without the plaintiff having any legal right to complain."

Exception.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed, which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words:

"If Mr. Alfred Huidekoper and Mr. F. W. Huidekoper are to be believed, the deed was directed to be withdrawn. F. W. Huidekoper went to New York about the close of November. There he met Judge Casey, with whome the plaintiff had some negotiations. In consequence of what took place at this interview, the deed was taken from Jay Cooke & Co. Dec. 1, and deposited with Drake Brothers, with in-
315 structions to allow Judge Casey to see it. I remember no other instructions given, but you are to determine what has been proved. It is in evidence that Frederick W. Huidekoper said to Casey, "Stitt might have time to carry out the proposed arrangement, and until he gave notice that it had failed'"

Exception.—To which said judgment of said court the plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words:

"Did this (the time allowed) refer to the negotiations in which Casey was then engaged? That failed about Dec. 15, 1864. Was there an agreement to allow to Stitt a refusal of the lands indefinitely? Is this probable, considering the fluctuating value of the lands in the oil region? Did Mr. Alfred Huidekoper agree to give such a perpetual or indefinite refusal? This is a suit upon an alleged joint contract, and both defendants must be liable or neither is."

316 *Exception.*—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words:

"If the contract terminated Dec'r 1, 1864, unless you believe that it was renewed or extended, or that a new contract was made, what the plaintiff did after that time was without authority from defendants, and, at most, permissive."

Exception.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words:

"If the contract did not expire Dec. 1, or if it was tacitly or
317 expressly continued, the defendants had still a right to terminate it without liability to the plaintiff at any time before he took up the deed, or effected a bona-fide sale for cash."

To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words: "It is not claimed, nor can it be, that the contract gave him a right to sell, as agent of the defendants, on credit—he could only make a cash sale. I discover not a word in the evidence that looked to any other than one for cash, and there is a wide difference between a sale for cash and one on credit. The latter may create an equitable interest that may require long time for its extinguishment, and yet may embarrass the legal owner, and interfere with his power to sell."

Exception.—To which said judgment of said court the plaintiff's counsel did then and there except, and request a bill of exceptions to be
sealed; which is now accordingly done.
318 W. STRONG. [L. S.]

Whereupon the said court, after reading the contract of January 10, 1864, between the plaintiffs Stitt, and Backus and Morse, did then and there further charge the said jury in the following words:

"Observe this contract was in Stitt's name. It makes no reference to the defendants as his principals. Did the plaintiff enter into that contract as an agent for the defendant, or in his own right, expecting to take up the deed?"

Observe, the price was made payable to himself, not to his principal. The forfeiture, in case of failure of Backus and Morse was to him. It was not a cash sale. It is true that, under a cash sale, the purchaser has a right to time for the examination of titles. But here the purchase-money was not payable until sixty days after the title had been examined. Even the $10,000.00 were only to be deposited. They were not to be paid over until after the title was examined, and the remainder was payable sixty days thereafter.

Again, Backus and Morse were not bound to take the property.
319 They obtained a refusal without liability for the whole purchase-money, except at their option.

Still further, the contract was not in duplicate. Stitt had no copy, and none was deposited anywhere. Stitt himself had no power of en-

forcing the payment of the price named for the lands in the event that Backus and Morse concluded to take them without more. And you will observe, gentlemen, that, on the 14th of January, 1865, when the $10,000.00 were paid, and when it is said Backus & Morse closed the contract and elected to take the whole body of the lands, we have no proof of such election except parol. Backus and Morse did not sign the election; it was signed by Drake, & [and] Backus was not present.

I instruct you, therefore, that the arrangement with Backus & Morse was not such a sale as the plaintiff under his contract set out in his declaration had a right to make; that it was not binding on the defendants, and that they were under no obligation to accept it.
320 Notwithstanding that contract they had a clear right to withdraw their deed from Drake Bro's, or to prohibit its delivery, and refuse to continue the plaintiff's agency.

Exception.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which was accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words:

"Nor is there any evidence of ratification that would justify you in finding that the defendants did ratify the bargain made by the plaintiff with Backus & Morse."

Exception.—To which said judgment of the said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words:

"You will not overlook the evidence that the plaintiff admitted he had transact[cend]ed his authority. Upon this subject I call your
321 attention to the testimony of Henry Huidekoper, Alfred Huidekoper, and Mr. Zane."

Exception.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exception to be sealed; which is accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words:

"Pass on now, gentlemen, to Jan. 24, 1865. On that day the defendants revoked the authority of Drake Bro's, if any they had, to deliver the deed.

"I instruct you, gentlemen, they had a legal right to make the revocation."

Exception.—To which said judgment of said court plaintiff' counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there instruct and charge the said jury in the following words:

And further: The defendants were executors and trustees of

322 the lands. It was their duty to obtain the highest possible price for them. When the discovery of the United States well, or any other thing, gave to the property an enhanced price in the market, it was their duty, as well as their right, unless they were restrained by some previous contract, to withdraw any refusal they had given that interfered with their power to make a sale most beneficial to their cestuis que trust."

Exception.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words:

"The revocation of the power to deliver the deed, if you believe it was made, put an end to the plaintiff's right to take the lands under the special arrangement with the defendants, and in effect terminated his agency.

"The subsequent tenders, even if made in good faith and kept alive, were therefore of no effect, and you need not trouble yourselves to consider them."

323 *Exception.*—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words:

"I need say nothing more to you respecting the case. Numerous points have been presented to me which it would serve no good purpose for me to answer in detail. It would rather tend to confuse your minds, and draw away your attention from what I consider the vital questions of the case. In regard to them I will say that, so far as I have not affirmed them, they may be considered as denied."

Exception.—To which said judgment of said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

Whereupon the said court did then and there further charge the said jury in the following words:

324 "The great and controlling question is whether the plaintiff made such a sale; or, rather, whether the contract made by him with Backus & Morse was such a sale or negotiation of a sale as the plaintiff, under his agency for the defendants, as set forth in the declaration and proved here at the trial, had authority to negotiate. If it was not, and I have instructed you that it was not, the defendants had a legal right to refuse to accept it, and to withdraw all authority they had given; and, if you believe they did so, your verdict should be for the defendants."

Exception.—To which said judgment of the said court plaintiff's counsel did then and there except, and request a bill of exceptions to be sealed; which is now accordingly done.

W. STRONG. [L. S.]

(Indorsed:) Bill of exceptions.

325 In the circuit court of the United States for the western district of Pennsylvania.

WILLIAM STITT *vs.* ALFRED HUIDEKOPER AND FREDERICK W. HUIDEKOPER.	No. 41. May term 1867.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 1st day of November, A. D. 1871.

[SEAL.] H. D. GAMBLE, *Clerk.*

[5-ct. int. rev. stamp, canceled.]

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, William McKennan, judge of the United States circuit court for said district, do hereby certify that H. D. Gamble, above-named, was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

W. MCKENNAN,
U. S. Circuit Judge.

PITTSBURGH, *Nov.* 1*st*, 1871.

[5-ct. int. rev. stamp., canceled.]

(Indorsement on cover:) No. 486. William Stitt, plaintiff in error, vs. Alfred Huidekoper and Frederick W. Huidekoper. W. Pennsylvania C. C. U. S. Filed 6th December, 1871.

REC. 486—7

IN THE

Supreme Court of the United States.

WILLIAM STITT, Plaintiff in Error,

vs.

ALFRED HUIDEKOPER and FREDERICK W. HUIDEKOPER, Defendants in Error.

No. 486.

Error to the Circuit Court of the United States,

FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

JAMES K. KERR,
E. S. GOLDEN,
G. W. GUTHRIE
Of Counsel.

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71 Grant and 75 Wood Street.

IN THE

Supreme Court of the United States.

WILLIAM STITT, Plaintiff in Error,
versus
ALFRED HUIDEKOPER and FREDERICK W. HUIDEKOPER, Defendants in Error.
No. 486.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

STATEMENT OF THE CASE.

1. This suit was instituted May 13, 1867, by and in the name of William Stitt against Alfred and Frederick W. Huidekoper, to recover the sum of $33,340, with interest from March 15, 1865, being damages sustained by the said William Stitt by reason of defendants' breach of a certain contract of employment by said defendants of the plaintiff to sell for them certain lands in Venango County, Pennsylvania, containing 1,288 acres.

The *Narr.* or declaration filed at the institution of the suit contained a special count on an alleged contract of employment to sell certain land in Venango County for a certain compensation agreed upon, and breach thereof by the defendants, but did not recite the contract and breach at length; to this were added the common counts for work and labor, money had and received, and on account stated.

Afterwards, by leave of Court, an amended *Narr.* was filed, which contained a full specification of the grounds upon which the plaintiff claimed to recover, to which, at the trial, by like leave of Court, the common counts filed with the first *Narr.* were added. Upon this *Narr.*, with the common counts so added, the plaintiff went to trial, the defendants having, by their pleas, denied the agreement and their liability.

The plaintiff claims that some time in the latter part of August, 1864, the defendants employed him to sell for them, at $30 per acre, certain land in Allegheny Township, Venango County, Pennsylvania, agreeing to give him $2,500 in case he should effect a sale within thirty days; that when the thirty days had expired, he reported to defendants that he had not been able to sell the land, but they told him that if he could effect a sale at that price, the time would make no difference. Under this extension, the plaintiff continued his endeavors to sell the land, but without success, until about the 15th day of November, 1864, when the time for making the sale was again extended, the old contract still remaining in force, although the terms were slightly modified by mutual consent. On examination it had been found that the tracts contained 1,288 acres, for which the defendants demanded $40,000 and they agreed with the plaintiff that in case he should effect a sale of said land for that sum, to pay him $2,500, as compensation for his services, and they further agreed, in case he should sell the land for more than $40,000, that he should have all over that sum, in addition to the said $2,500. In other words, they agreed to give him, if he sold the land, all over $37,500, but that he should not sell for less than $40,000. In order to effect this sale it was agreed that the plaintiff should have all the time he required, at least until he notified the defendants that he could not sell. (See record, page 52).

For the purpose of carrying out this arrangement and to enable the plaintiff to operate more conveniently in the eastern cities, the defendants (who lived in Meadville, Pennsylvania), executed to plaintiff a deed for the land, (see page 68 of printed record) which they sent to Jay Cooke & Co., Philadelphia, with instructions to deliver the same to plaintiff upon his depositing $40,000. (Record, page 62.)

This deed was afterwards removed by defendants to New York

and deposited with Drake Brothers, bankers of that city, with similar instructions.

Plaintiff claims that this deed was merely a substitute for a power of attorney, and was made for the purpose of enabling him to effect and consummate a sale of the land in his own name and without any unnecessary delay, whenever he should find a purchaser.

In pursuance of the said agreement, plaintiff went to work for the purpose of finding a purchaser, he employed other parties to assist him; made several trips to the land, taking parties from Philadelphia and New York to examine it, spending $4,000 or $5,000 in his efforts, but without success until the tenth day of January 1865, when he entered into a contract to sell the land to S. A. Bachus and Joseph Morse, Jr., at $55 per acre, or $70,840 for the whole, (see record, page 651), giving them until the fourteenth of January to decide whether they would take it. On January fourteenth, the purchasers, in accordance with the contract, deposited $10,000 with Drake Brothers and gave notice of their election to take the land, (see record, page 66), and on the same day plaintiff wrote to defendants informing them that he had sold the land and had $10,000 cash in hand, and requesting them to forward an abstract of the title to the lands, which they did.

On the twenty-fourth day of January, 1865, ten days after the deposit of $10,000, the defendants telegraphed to Drake Brothers to consider Stitt's deed withdrawn (see record, page 70), and on the following day (January twenty-fifth) they wrote to the same effect. (Record, page 71.) The telegram was received the day of its date, and the letter on January twenty-seventh. On the last named day Stitt, the plaintiff, called on Drake Brothers, tendered $40,000 and demanded the deed, but they, on account of defendants' telegram, refused to deliver it.

On the fifteenth day of March, being within the time allowed by the contract, the purchasers tendered to Drake Brothers $62,000, making together with the $10,000 already deposited, $72,000, being more than the contract called for, and demanded the deed, but they were also refused, in pursuance of defendants' instruction.

By these refusals and by their subsequent conduct in refusing to complete the sale, the plaintiff was deprived of the commissions he had earned, and as no title had passed to Bachus and Morse, he was

remitted to his action against his principals, the defendants, for a breach of their contract.

The defendants filed three pleas (record, page 5), upon which issue was joined, and on May 9, 1871, the trial commenced, which terminated May 16, 1871, the jury finding for the defendants under the instructions of the Court. On May 18, 1871, the plaintiff filed this writ of error.

ASSIGNMENTS OF ERROR.

1. The Circuit Court erred in refusing to admit the following evidence offered by the plaintiff:

Plaintiff having offered the copy of the abstract of title dated January 16, 1865, as proven by the plaintiff, defendants object to the admission of the copy, and offered to produce, under plaintiff's notice, what defendants allege to be the original, and thereupon produce the same. The plaintiff denies that the paper produced is the original, and proposes to prove by William Stitt that the said paper is not the original.

Objection.—To which offer defendants' counsel objected that the original produced on notice is the best and only evidence; that it is not competent to the plaintiff to refuse it on his own allegation that it is not the original, and thereupon, and in its presence and upon the footing of his own denial, to introduce secondary evidence of the paper in question.

Judgment.—The defendants being in court and ready to be examined, to prove that the paper produced is the original, and the plaintiff declining to examine them, the Court did thereupon sustain the said objection and reject the said evidence.

2. The Circuit Court erred in refusing to admit the following evidence offered by plaintiff:

Plaintiff offers to prove by the witness (William Stitt) that, at the time the contract of January 10, 1865, was made and signed by the parties, Bachus and Morse, the purchasers, claimed that they would reasonably require sixty days' time within which to examine the lands and the titles, owing to the distance from New York to

Venango County, Pennsylvania, and the difficulty of having searches and examinations made by competent attorneys in Pennsylvania, on account of the great number of real estate transactions in the oil regions, and that the sixty days' time allowed in the contract was a reasonable provision under the circumstances of the case; and that the plaintiff consented to that provision in the contract for the purpose of allowing the purchasers to examine the lands and to procure professional examinations of the titles to be made; and also to prove that, according to the usual course of business in that behalf, at that time and under similar circumstances, the time given in said contract was reasonable; that it ordinarily required from thirty to sixty days to examine titles in Venango County at that time; to be followed by several other witnesses on the same subject, some of whom are lawyers and professionally familiar with the situation at that time.

Objection.—To which offer defendants' counsel did then and there object.

Judgment.—Whereupon the said Court did sustain the said objection and reject the said evidence.

3. The Circuit Court erred in refusing to admit the following evidence offered by plaintiff:

Plaintiff offers to prove by witness (William Stitt), to be followed by other witnesses, on the same subject, that when Venango County oil lands were sold in the cities of Philadelphia or New York, during the winter of 1864-65, it ordinarily required from thirty to sixty days to have a thorough professional examination of titles and liens made, when there were several titles to be examined, and that when any provision was made about the time for the examination of titles, that sixty days would not be an unreasonable period of time, taking into account the state and condition of the offices in which the records of titles and liens were kept and the amount of business in the hands of reasonable and competent attorneys in the oil regions, and other difficulties attending the examinations of titles.

Objection.—To which offer defendants' counsel did then and there object.

Judgment.—Whereupon the said Court did sustain the said objection and reject the said evidence.

4. The Circuit Court erred in refusing to admit the following evidence offered by the plaintiff:

Plaintiff offered to prove by the witness (William Stitt), to be followed by Joseph Morse, Jr., and Seth A. Bachus, all the parties to the contract, that when the contract was made, it was the intention and agreement of the parties to provide in the contract that the purchase money should be paid as soon as the titles could reasonably be examined, and that it was a mutual mistake that the language of the contract was not made to express that understanding, and that the omission, in the contract, of such words as were necessary to express that conclusion, was a mutual mistake, such as ought to be corrected.

Objection.—To which offer defendants' counsel did then and there object.

Judgment.—Whereupon the said Court did sustain the said objection and reject the said evidence.

5. The Circuit Court erred in refusing to charge the jury as requested by the following point:

If the jury find from the evidence, that the defendants authorized the plaintiff to sell the lands described in their deed in evidence in this case, without limitation as to time, and that in pursuance thereof, the plaintiff, with reasonable diligence and *bona fide* sold said lands, by the contract of January 10, 1865, to Bachus and Morse, giving them, from the date thereof, as much time as was necessary to have the title examined (not exceeding the time mentioned in said contract), then the defendants could not, upon notice from the plaintiff of said sale, revoke his authority, and defeat or interrupt the passage of the title from them to the purchasers from the plaintiff, without liability to the plaintiff for any loss sustained by him by reason of their, defendants', acts.

Denied, except so far as affirmed in the general charge.

6. The Circuit Court erred in refusing to charge the jury as requested in the following point:

If the jury find from the evidence that an arrangement was made, as testified to by the plaintiff, he (the plaintiff) had the right in effecting such sale, to allow a reasonable time for the

examination of the lands and their titles before the payment of the purchase money, and the defendants could not for that reason repudiate the sale, and in determining whether the time allowed was reasonable, the jury will consider the location and amount of land sold; its distance from the place of sale; the amount of purchase money agreed to be paid; the difficulty of having examinations and searches made at that time and place, and all other facts and circumstances proven in the cause.

Denied, except so far as affirmed in the general charge.

7. The Circuit Court erred in refusing to charge the jury as requested in the following point:

If the jury find from the evidence that the defendants agreed by *parol* that, in case that the plaintiff would procure the lands embraced by the deed in evidence to be sold, or would find a purchaser for the same at a price not less than $40,000, that then the said sale should be consummated, and they would allow the plaintiff all the purchase money in excess of $37,500; and, that in pursuance of, and upon the faith of such agreement, the plaintiff expended his time and money in efforts to effect such sale, and did effect a sale in a manner substantially conformable to such agreement, and that the defendants subsequently refused to consummate the sale, by reason whereof the plaintiff was prevented from receiving his portion of the purchase money from the purchasers, then the plaintiff is entitled to recover in this case the amount of money actually lost by him in consequence of the defendants' refusal to convey, viz.: the difference betwen the contract price ($70,840) and the amount reserved by defendants ($37,500), with interest from the date of such refusal.

Denied, except so far as affirmed in the general charge.

8. The Circuit Court erred in refusing to charge the Jury as requested in the following point:

That there is no substantial difference between a permission given to a broker to sell and an agreement in *parol* to employ him to sell, and in either case, if the broker or agent on his part complies, it is the duty his of principal to pay the compensation agreed upon.

Denied, except so far as affirmed in the general charge.

9. The Circuit Court erred in refusing to charge the jury as requested in the following point:

That it was the duty of defendants when advised of the sale by plaintiff as their agent or broker, if dissatisfied with the sale, promptly to disavow his acts and notify the broker, and in this case, if the jury believe from all the evidence that plaintiff did, on or about the 14th of January, 1865, advise the defendants that he had sold, or, if they otherwise came to the knowledge of the fact, and with such knowledge, furnished to the plaintiff, or to Drake Bros, for the use of the purchasers an abstract of the titles to the lands, and by words advised the purchasers, or either of them, that the sale was all right, such acts, together with the acquiescence of the defendants until the 24th January, 1865, a period of ten or eleven days, was such a recognition of the agent's authority and satisfaction of said sale so made by him, as now to estop them from denying either his authority or performance of his part, so far as affects his (the broker's or agent's) right to recover in this action.

Denied, except so far as affirmed in the general charge.

10. The Circuit Court erred in refusing to charge the jury as requested in the following point:

That, if the jury belive from the evidence that the power to sell given by the defendants to the plaintiff, was without limitation as to time; or, if originally limited, was subsequently expressed or impliedly freed from limitation by the acts of the defendants, or either of them (with the concurrence or subsequent acquiescence of the other), in that event the tender of $40,000 made by plaintiff to Drake Bros. for defendants, on the 27th January, 1865, in view of the contract of 10th January, 1865, was on him, and its validity could not be affected by the telegram of January 24th, 1865.

Denied, except so far as affirmed in the general charge.

11. The Circuit Court erred in refusing to charge the jury as requested in the following point:

If the jury belive from the evidence in the case that defendants, as stated in the foregoing points, authorized plaintiff to sell said lands, and in pursuance of said authority, the plaintiff did, by the agreement of January 10th, 1865, sell the same in good faith to

bona fide parties, who acted upon the faith of said authority, with full notice of the same and the extent thereof, and were not advised of any limitations of the authority of said plaintiff as to time, examination of titles and land, &c., and the said contract was reasonable and fair in its terms, the said defendants are now estopped from denying the authority or limiting its extent by terms or conditions not coupled with the authority itself.

Denied, except so far as affirmed in the general charge.

12. The Circuit Court erred in charging the jury in the following words:

It has not been claimed, and certainly it cannot be, that all rights the plaintiff had under the first arrangement, that of August, 1864, did not expire with the thirty days within which he was authorized to sell, or certainly when he reported to the defendants that he had failed to sell, and as his compensation was contingent upon his success, he had then no legal claim for compensation for his labor or his expenditures.

13. The Circuit Court erred in charging the jury in the following words:

Unless there was an agreement to the contrary, the defendants had a right to withdraw their offer at any time, and decline to allow the deed to be delivered.

14. The Circuit Court erred in charging the jury in the following words:

But I gave it to you as a matter of law that, in the absence of any agreement to the contrary, the defendants had a legal right to withdraw the deed and terminate the arrangement at any time before the $40,000.00 were paid in cash to Jay Cooke & Co.

15. The Circuit Court erred in charging the jury in the following words:

Some evidence has been given respecting the letter to Jay Cooke & Co. I do not think it of much importance. The letter was dated Nov. 27. W. A. Huidekoper says, that is a mistaken date; that it was written and sent on the 22d, and that it was copied in their

letter-book. You have the letter-book before you, containing a copy between letters dated Nov. 21st and Nov. 23d. It is for you to say how this is. Two experts have sworn they think the letter was never copied. You have heard their reasons for their opinion. I think you will probably conclude they are mistaken. Nothing was to be gained by establishing that the letter was written on the 27th rather than the 22d, and the plaintiff himself testifies that a letter was written on the day when the deed was executed (Nov. 22d), though he does not say that it was included in the envelope with the deed. I refer to this only, gentlemen, because it is an attempt to impeach the honesty of the defendant; unsuccessful, in my opinion, though the matter is wholly for you. I do not perceive that it makes any difference whether the letter was written on the 27th or the 22d.

16. The Circuit Court erred in charging the jury in the following words:

"In regard to the arrangement of Nov. 19th, 22d, there is a discrepancy between the testimony of the plaintiff and that of the defendants. Mr. Stitt testifies that he asked to have a time fixed during which he might operate to sell the lands; and that Mr. Alfred Huidekoper declined, stating it was better for him no time should be fixed. On the other hand, both the defendants testify that two papers were drawn, and signed by them both, one fixing the time until Dec. 1st, and the other agreeing to refund $2,500, if the plaintiff took up the deed. These papers, they say, were delivered to the plaintiff; of this, A. Huidekoper is positive; and F. W. Huidekoper thinks they were delivered."

A call has been made for these papers, and they have not been produced.

Were any such papers given?

You should reconcile the testimony, if possible, without imputing falsehood to either affiant. It is a rule of presumptions that, ordinarily, a witness who testifies to an affirmative is to be preferred to a negative? Why? It is because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed.

17. The Circuit Court erred in charging the jury in the following words:

"But this is not a very important matter. If you should find there was no such limitation, still the defendants had a legal right to withdraw their deed, and put an end to the agency at any time they chose, without the plaintiff having any legal right to complain."

18. The Circuit Court erred in charging the jury in the following words:

"If the contract did not expire Dec. 1st, or if it was tacitly or expressly continued, the defendants had still a right to terminate it without liability to the plaintiff at any time before he took up the deed, or effected a sale for cash."

19. The Circuit Court erred in charging the jury in the following words:

"It is not claimed, nor can it be, that the contract gave him [the plaintiff] a right to sell, as agent of the defendants, on credit—he could only make a cash sale. I discover not a word in the evidence that looked to any other than one for cash, and there is a wide difference between a sale for cash and one on credit. The latter may create an equitable interest that may require long time for its extinguishment, and yet may embarrass the legal owner, and interfere with his power to sell."

20. The Circuit Court erred in charging the jury in the following words in relation to the contract of January 10, 1865, with Backus and Morse.

Observe, this contract was in Stitt's name. It makes no reference to the defendants as his principals. Did the plaintiff enter into that contract as an agent for the defendant, or in his own right, expecting to take up the deed?

Observe the price was made payable to himself, not to his principal. The forfeiture, in case of failure of Backus and Morse was to him. It was not a cash sale. It is true that, under a cash sale, the purchaser has a right to time for the examination of titles. But here the purchase money was not payable until sixty days after the title had been examined. Even the $10.000.00 were only to be

deposited. They were not to be paid until after the title was examined, and the remainder was payable sixty days thereafter.

Again, Backus and Morse were not bound to take the property. They obtained a refusal without liability for the whole purchase money except at their option.

Still further, the contract was not in duplicate. Stitt had no copy and none was deposited anywhere. Stitt himself had no power of enforcing the payment of the price named for the lands in the event that Backus and Morse concluded to take them without more, and you will observe, gentlemen, that, on the 14th of January, 1865, when the $10,000 was paid, and when it is said Backus and Morse closed the contract and elected to take the whole body of the lands, we have no proof of such election except parol. Backus and Morse did not sign the election; it was signed by Drake, and Backus was not present.

I instruct you, therefore, that the arrangement with Backus & Morse was not such a sale as the plaintiff, under his contract set out in his declaration, had a right to make; that it was not binding on the defendants, and that they were under no obligation to accept it. Notwithstanding that contract they had a clear right to withdraw their deed from Drake Bros., or to prohibit its delivery, and refuse to continue the plaintiff's agency.

21. The Circuit Court erred in charging the Jury in the follownn words:

Nor is there any evidence of ratification that would justify you in finding that the defendants did ratify the bargain made by the plaintiff with Backus & Morse.

22. The Circuit Court erred in charging the jury in the following words:

Pass on now, gentlemen, to Jan. 24, 1865. On that day the defendants revoked the authority of Drake Bros., if any they had, to deliver the deed. I instruct you, gentlemen, they had a legal right to make the revocation.

23. The Circuit Court erred in charging the jury in the following words:

The revocation of the power to deliver the deed, if you believe it was made, put an end to the plaintiff's right to take the lands under the special arrangement with the defendant, and in effect terminated his agency.

24. The Circuit Court erred in charging the jury in the following words:

"The great and controlling question is whether the plaintiff made such a sale; or, rather, whether the contract made by him with Backus & Morse was such a sale, or negotiation of a sale, as the plaintiff, under his agency for the defendants, as set forth in the declaration and proved here at the trial, had authority to negotiate. If it was not, and I have instructed you that it was not; the defendants had a legal right to refuse to accept it, and withdraw all authority they had given; and, if you believe they did so, your verdict should be for the defendants."

POINTS.

FIRST.

Is the simple production of a paper in court by one of the parties to the suit, *prima facie* evidence that it is the original, and sufficient to exclude the opposite party from proving what were the contents of the original paper?

This is the effect of the ruling of the Circuit Court embraced in our first assignment of error. We had, under the rules, notified the defendants to produce, on the trial of the cause, the original abstract of title sent to Drake Brothers, in response, as we alleged, to Mr. Stitt's letter of January 14th, 1865. When on the trial they produced a paper which they claimed to be the original, we denied that it was so, and proposed to give evidence as to whose hand-writing the original was in.

This was important to our case. The paper produced by the defendants was in Frederick W. Huidekoper's hand-writing, while we were prepared to prove that the original was in Alfred Huide-

koper's. Mr. Stitt was prepared to testify to this, and William F. Drake had already testified to the same thing in his depositions (Record, page 30). The purpose of the defendants was clear; they desired to separate Alfred and Frederick W. Huidekoper, and to throw all the responsibility of the matter on the latter; to show, if possible, that this transaction was carried on by Frederick, and that Alfred was practically ignorant of it all.

Such a rule as this, would work hardship to suitors, and open the door to many frauds. Of course, in the presence of a paper, admitted to be the original, it is not competent to introduce secondary evidence as to its contents, but to prohibit the opposite party from proving what were the contents of the original paper, and that the paper produced is not the original, would enable parties so disposed to palm off on the Court and jury any fraudulent paper they might see fit to produce, without possibility of redress.

SECOND AND THIRD.

1st. It is competent for a party to a written instrument to introduce evidence of the surrounding circumstances and attendant conversations of the parties for the purpose of explaining the meaning of the contract, and applying to the proper subject matter, the terms and phrases used therein.

It is true that the interpretation of a written instrument is for the Court, but in order to arrive at the true intention of the parties, it is proper to receive evidence of the circumstances surrounding them, and the conversations carried on, at the time the contract was reduced to writing.

From the wording of the contract of January 10th, 1865, between the plaintiff and Backus & Morse, some question might arise as to the purpose for which the sixty days between the deposit of the $10,000.00 and the payment of the balance of the purchase money, were allowed. In order to avoid any possible question as to this point, we offered to prove what were the circumstances surrounding the parties at the time this contract was made and the conversations carried on between them, showing clearly that this time was allowed merely for the purpose of giving the purchaser a reasonable time to examine the titles, and that sixty days so allowed was a reasonable time for that purpose.

In his work on evidence, (vol. 1, page 324) Greenleaf says that courts in interpreting a contract may "put themselves in the place of the party, and then see how the terms of the instrument affect the property or the subject matter." Further on (page 325) he says, "parol evidence is admissable to explain written instruments; namely, by showing the situation of the party in all his relations to persons and things around him, or, as elsewhere expressed, by proof of surrounding circumstances." And again, (page 327) "Previous conversations between the parties may be shown when that becomes important, to show in what sense subsequent writings passing between them were understood."

These rules have been followed time and again, both in this country and in England. In *McDonald vs. Longbottom*, 1 Ellis and Ellis, 977, conversations between the plaintiff and the defendant's agent were admitted to show what was meant by certain expressions used, and Judge Story, in the case of *Grey et al. vs. Harper et al.*, reported in 1 Story, 574, admitted conversations between the parties at the time of making a contract, to show the sense which they attached to a particular term.

This is what we proposed in these offers: to acquaint the Court with all the surrounding circumstances, the situation of the lands, the difficulty of getting titles examined, and the conversation of the parties in relation to the very provision of the contract in dispute.

The Court of Appeals of New York in the case of *Hutchins vs. Hubbard*, 7 Tiffany, 26, held that, "When the purpose for which a writing was executed is not inconsistent with its terms, it may properly be proved by parol."

Now, it was not inconsistent with the terms of this contract, to show that the sixty days allowed were for the examination of the titles to the land. As the written contract stands, there is no express statement of the purpose for which this time was allowed, and to show that purpose by parol, does not contradict the instrument in any particular; it is merely applying the contract to its proper subject matter.

In Pennsylvania, the Courts have gone further in the admission of parol evidence than any of the authorities above cited. As early as 1827, Judge Huston, speaking of the rules as to parol evidence, used the following language: "We seem to have settled down to

this: whatever material to the contract was expressed and agreed to when the bargain was concluded, and the article drawing, may, if not expressed in the article, be proved by parol." *Bollinger vs. Eckert*, 16 S. and R. 424. See also *Selden vs. Williams*, 9 Watts, 9.

In the case of *Chalfant vs. Williams*, 11 Casey, 215, where the offer was to prove conversations between the parties for the purpose of proving in an action on a contract for the purchase of a colliery for a gross sum, to be paid at a certain rate per ton on each ton of coal mined, that at the time of the execution of the contract, the parties agreed that the vendees should not be bound to take out enough coal to pay for the mine, Judge Woodward held that the evidence was properly received. In his opinion, he said, "It is manifest, therefore, that the parol evidence contradicts nothing expressed in the writing, but only an implication from what is written. If we held to the rule that is laid down in Starkie's Ev. part 4, page 1,009, that parol evidence is inadmissible for the purpose of altering the legal operation of an instrument, we should be obliged to reverse the ruling in the case; but we have got far away from that rule. We permit a deed absolute on its face to be proved a mortgage; we receive parol evidence to rebut a presumption or an equity—to supply deficiencies in the written agreement—to explain ambiguities in the subject—matter of writings—to prevent frauds, and to correct mistakes." See also *Barnhart vs. Riddle*, 5 Casey, 92.

Prior to either of these cases, Ch. J. Gibson, in *Bank vs. Fordyce*, 9 Barr, 275, said: "Where a witness is called to prove a written contract, the defendant may prove, by his cross-examination, circumstances occurring at the time, whereby the legal operation of the instrument was restrained."

In order that the Court may properly interpret the meaning of any instrument, it is necessary and proper that it should place itself as nearly as possible in the position which the parties themselves occupied when the contract was made and reduced to writing; should hear the conversations of the parties; learn all the surrounding facts and circumstances, and above all, acquaint itself with the subject mater of the contract itself.

When, as in this case, the contract itself is silent as to the purpose for which any particular provision is made, it cannot be said that parole vidence, to apply it to its proper subject matter, contradicts or

varies the written instrument, and even when such evidence does vary the legal operation of the instrument, or rebut a presumption arising from it, we have seen that it is admissible.

Moreover, this was not an action on the instrument itself between the parties to it, but was a collateral action, and the instrument was introduced in evidence merely to show what the plaintiff had done under the original contract. In such cases the old common law rule never had any application, but it was always permissible to prove what the real contract was. See *Reynolds vs. Richards*, 2 Harris, 205.

2d. In these offers, we further offered to prove that the time allowed in this contract, as we alleged, for the examination of the titles to the land, was a reasonable time for that purpose.

It is not claimed, and cannot be, that on a cash sale, the purchaser is not entitled to a reasonable time for the examination of the titles to the land. Judge Strong admits this in his charge to the jury, and the universal practice of the profession, and all the authorities, show that it is so.

In order, then, to avoid any unnecessary delay and to compel the purchasers to the exercise of proper diligence in having examinations made, the plaintiff, as we claimed, provided in his contract with them that such examinations should not occupy over sixty days. Was this a reasonable time for that purpose?

The contract was made January 10th, 1865, and on the 14th Backus & Morse gave notice of their election to take the whole of the land. On that day the sale was completed; the plaintiff immediately wrote for an abstract of the title; this was forwarded by the defendants January 16th, and could not reach New York before the 18th of that month, and would not probably be delivered to the purchasers before the 19th or 20th. The purchasers lived in New York, and knew nothing about the attorneys in Venango county, where the lands were situated, and where the examinations would have to be made. Inquiries would have to be made, letters written and answered, before the examination could be commenced, and it could not be made at that time in less than three or four weeks.

This was a mixed question of law and fact, and the evidence should have been submitted to the jury, with proper instructions

from the Court for their guidance. *Prescott Bank vs. Caverly*, 7 Gray, 217.

FOURTH.

Whenever, either by reason of fraud, accident or mistake, a written instrument or contract fails to express the meaning of the parties thereto, courts of equity have the power to correct the same, either by inserting words or phrases which have been omitted, or by striking out anything which should not have been put in; and in courts which have no separate equity jurisdiction, but where law and equity are administered together through the common law forms, evidence of fraud or mistake in the construction of a written instrument, tending to show that the writing does not express the agreement of the parties, and what such agreement really was, should be received and submitted to the jury.

1st. The jurisdiction of courts of equity for the correction of written instruments, is so well established as not to need any citation of authorities.

In Pennsylvania, however, where equity is administered through common law forms, it has been the constant practice, as shown by our earliest reports, to submit to the jury evidence tending to show fraud or mistake in a written instrument, for the purpose of correcting it in accordance with the true agreement of the parties.

"It has frequently been held, that where equity would set aside or reform the instrument on either of these grounds, [*i. e.* fraud, accident or mistake,] parol evidence is admissible to contradict or vary the terms of the agreement as written." *Martin vs Berens*, 19 P. F. Smith, 459.

In *Christ vs. Diffenbach*, 1 S. & R., 464, Ch. J. Tilghman said: "Without citing cases, or undertaking to enumerate all the exceptions to the general rule, it may be laid down as settled law, that parol evidence is admissible in cases of fraud, and of plain mistake in drawing a writing." Further on he says: "Whether the plaintiff could have made good his assertion, is not now to be inquired of; but undoubtedly, he should have been allowed an opportunity of doing it."

In the same case Judge Yeates said: "It [the evidence] is not read to contradict the face of the agreement, which the Court would

not allow, but to prove a mistake therein, which cannot otherwise be proved. I think the parol evidence ought to have been allowed to go to the jury, and therefore the judgment should be reversed." See, also, *Miller vs. Henderson*, 10 S. & R., 290, and *Rearich vs. Swinehart*, 1 Jones, 233. In *Hamilton vs. Asslin*, 14 S. & R., 448, Judge Gibson held that parol evidence was admissible for the purpose of showing that one of the covenants contained in the written instrument on which the action was brought, ought not to have been inserted therein.

It is evident from these cases, and from many others cited in them, that whenever a court of equity would give relief by reforming the instrument, it is proper to submit to the jury evidence tending to show that by mistake something was inserted in the contract which should have been omitted, or something omitted which should have been inserted, and that it is error to refuse to receive such evidence.

Does not this case come within the equitable rule? Our offer was to prove by the testimony of all the parties to the contract, that it was their intention and agreement that the purchase money for the land should be paid as soon as the titles could reasonably be examined, and that it was a mutual mistake that the language of the contract was not made to express that understanding.

This offer was clearly within the rule; it contained a statement of what the instrument should have contained, an allegation that it was a mistake that the instrument was not so written as to express the real agreement of the parties; and that such mistake was mutual.

The rule, as laid down in Adams on Equity, page 343, is, that "the instrument may be corrected, if it is admitted or proved to have been made in pursuance of a prior agreement, by the terms of which both parties meant to abide, but with which it is in fact inconsistent."

We argue, therefore, that this evidence should have been received and submitted to the jury. If believed by them, there could have been no question as to the effect of the contract of January 10th, 1865, except as to whether or not sixty days was a reasonable time for the examination of the titles to the land. Thus reformed, the contract would have expressed the intention of the parties so clearly

as to leave no room for doubt. An agreement to sell, the balance of the purchase money to be paid as soon as the title could reasonably be examined, such time not to exceed sixty days, would certainly be within the power of an agent authorized to sell only for cash.

Whether or not the evidence would have been sufficient to establish this point is not now the question; the offer was not overruled on that ground, and until the evidence is heard, no one can say what will be its effect when received.

2d. It cannot be contended that this evidence was inadmissible, because the subject matter of this contract being real estate and within the statute of frauds and perjuries, the effect of the evidence would be to reduce the whole to parol, and therefore be incapable of being enforced by the Huidekopers against Backus & Morse. For although this may be true in some of the States, it is not law either in New York, where the contract was made, nor in Pennsylvania, where it was to be enforced. Judge Story, in his work on Equity Jurisprudence, does not hesitate to repudiate such a rule, and Chancellor Kent has twice held that a bill to correct a contract by parol evidence of mistake, and then to enforce specific performances of the agreement as reformed, would lie. *Gillespie vs. Moon*, 2 Johns. Ch. R., 585, and *Keisselbrack vs. Livingston*, 4 Johns. Ch. R. 144. These cases firmly establish the law on this point in New York, and they have never been overruled or departed from.

The law is equally clear in Pennsylvania. In *Tyson vs. Passmore*, 2 Barr, 122, an action of ejectment to recover certain lands, the right to which the defendant represented in parol, passed under an assignment of a warrant and survey, whereas only about seventy-five acres thereof so passed, Ch. J. Gibson held that parol evidence of the real understanding of the parties should have been received, and the agreement as reformed, enforced. The same rule has been adopted in this Court in *Hunt vs. Rousmaniers*, 8 Wheat. 211, and 1 Peter's S. C. R., 13; *Rhode Island vs. Massachusetts*, 15 Peter's S. C. R., 233.

It is apparent, therefore, that the admission of this evidence of mistake would not have vitiated the contract, for whether Backus & Morse brought their action to recover the land in Pennsylvania, or

the Huidekopers brought theirs for the purchase money in New York, the law would be the same in either case, and after reforming the contract in accordance with the evidence, the Courts would have proceeded to enforce it, and this Court has often held that in cases affecting titles to real estate and the construction of local statutes, it will adhere to the rules adopted by the respective States where the rights are to be enforced.

3d. Moreover this argument is defective for another reason, because, even if this evidence would have rendered the contract of January 10th, 1865, incapable of enforcement under the statute of fraud, still the plaintiff, under the circumstances of the case, would have been entitled to his commissions.

A broker earns his commission, when he finds a person willing to take the lands on the terms and at the price fixed by his principal, and the latter cannot deprive him of it by a refusal to complete the sale *Moses vs. Bierling*, 31 N. Y., 462. It is not necessary that the broker should procure a binding contract to be executed, if he produces a purchaser who is willing to execute one and ready to pay the price fixed; and if the completion of the contract is defeated by the refusal of the vendor, he is liable to the broker for the full amount of the commissions. *Koch vs. Emmerling*, 22 How. 69.

If the evidence offered had been received, we would have shown that the plaintiff found a purchaser who was willing to take the land at a price far above the one fixed by the defendants, and that the purchaser was ready, able and willing to pay for the lands, provided the title thereto proved satisfactory. This was all he had to do; if, after this, the negotiations were broken off by the defendants, or if they refused to complete the contract, they thereupon became liable to the plaintiff for the amount of his commission. If no binding contract had been executed, they could have withdrawn without liability to the purchasers, but not without liability to their broker, who had done all that the law required him to do.

FIFTH AND SIXTH.

An agent employed to sell real estate earns his commission when he finds a purchaser ready and willing to buy at the place and on the terms fixed by his principal, and the latter cannot defeat his right to them by a refusal to complete the sale.

This has already been partially argued, but these points contained other matters, which were important to the case.

1st. Can a broker, authorized to sell for cash, allow a purchaser a reasonable time for the examination of the titles to the land? and,

2d. Is it not a question for the jury to determine whether, under all the circumstances of the case, the time allowed for that purpose is reasonable?

1st. On a sale, whether for cash or on time, it is the duty of the vendor to procure and tender a good title to the land sold, before he can enforce specific performance of the agreement, and it must necessarily follow that the vendee is entitled to a reasonable time to examine the title tendered. Otherwise gross injustice might be done, for a vendor could, as soon as the contract was closed, tender a conveyance and demand the purchase money, and upon a refusal to pay until the title was examined, either rescind the contract or bring suit for the purchase money and throw the costs upon the vendee. The mere statement of the consequence of a contrary rule, is sufficient to show the absurdity of it; it would put the purchaser completely in the power of the vendor. In his anxiety, on the one hand, to secure the property, and on the other, to avoid the cost and annoyance of a law suit, he would not know which way to turn.

2d. The question as to the reasonableness of the time allowed for the examination of the titles, viz., sixty days, was properly one for the jury, and should have been submitted to them, and in determining it, evidence showing the situation of the land, and the parties, and the difficulty of having examinations made by competent attorneys, would be properly submitted to them.

The jury is the only tribunal competent to pass upon such questions. The instructions asked for in the points embraced in the fifth and sixth assignments of error, should have been given to it. The contract between plaintiff and defendants was in parol, and the construction of a parol contract is always for the jury. What that contract was, and what was the extent of the authority conferred on the plaintiff by it, was for the jury to determine, and not for the Court.

Evidence had been given that there was no limitation in the contract as to the time within which the sale should be effected.

Whether or not this was true, was for the jury, and it was for them to decide whether the plaintiff had made such a sale as would entitle him to his commission, or in other words, had, during the period of his employment found a purchaser ready and willing to buy on the terms upon which he was authorized to negotiate a sale.

SEVENTH.

If a party employs an agent to sell real estate and agrees to give him, as compensation, all that the same may sell for over and above a certain price, and the agent finds a purchaser ready and willing to take the land at a sum above the amount fixed, he has earned his commission, and if his principal refuse to complete the sale he renders himself liable to the broker, and the measure of damages is the difference between the price at which the purchaser was willing to buy, and the amount reserved by the principal.

If it be true that a broker has performed his duty when he finds a purchaser ready and willing to buy at the price and on the terms fixed, it necessarily follows that the owner cannot refuse to go on with the sale and thereby defeat his right to compensation for his labor, and the only correct measure of damage is the one fixed by the contract itself.

In *McGavock vs. Woodlief*, 20 How., 221, Mr. Justice Nelson says: "The broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions. Then he will be entitled to them, though the vendor refuse to go on and perfect the sale."

This was the question which we asked the Court to submit to the jury. Did the plaintiff "find a purchaser in a situation, and ready and willing to complete the purchase on the terms agreed on? If so, he had earned his commissions, and the measure of damages in an action against his principals, is the loss which he suffered by reason of their refusal to complete the sale.

What does it matter in this action, if the contract of January 10th, 1865, was not binding on the defendants? The purchasers were ready and willing to complete the contract, and as to their ability to do so, that was a question for the jury. If they had withdrawn from the contract before it was completed, the plaintiff's

right to recover might have been defeated, because he had not done what the law required him to do; but such was not rhe case; the completion of the contract was prevented only by the refusal of the defendants, and under the rule laid down in *McGavock vs. Woodlief*, and *Koch vs. Emerling*, they are liable to the plaintiff for the full amount of his commission.

EIGHTH AND NINTH,

1st. There is no substantial difference between a permission given to a broker to sell, and an agreement in parol to employ him to sell, and in either case, if the broker or agent on his part negotiates a sale on the terms of the principal, he is entitled to the commission agreed upon.

This point was prepared in view of the position taken by the defendants in the affidavit of defence. In it the defendants alleged that they "did at one time permit said William Stitt, but did not employ him to find a purchaser for defendants' lands." Such a distinction cannot serve to alter the rights of the parties. If the defendants *permitted* the plaintiff to give his time and labor and expend his money in endeavoring to sell their land, under an agreement for commissions, in case he found a purchaser at their terms, they are liable for his commissions, and cannot say that they did not *employ* him to do this.

2d. Moreover, the acts of the defendants, as testified to by plaintiff's witnesses, were such as to estop them from denying his authority. They stood by for nearly five months, from the middle of August until the middle of January, and permitted him, without one word of objection, to spend his money and time in endeavors to sell their land: they referred other parties to him (record, page 66, Exhibit C), they corresponded with him about the lands and his efforts to sell them; and finally when advised by him that he had made a sale, and requested to furnish an abstract of title, they forwarded the abstract, without any disavowal of his authority.

These acts should have been submitted to the jury, in conjunction with the plaintiff's testimony, and it would be for it to say what was the extent of his authority.

It was their duty, if dissatisfied with the sale, to disavow Stitt's authority as soon as advised of it. This they did not do, but in-

stead, complied with plaintiff's demand for an abstract of title, and it was not until January 24th, ten days after plaintiff wrote to them, advising them of sale, and eight days after they sent the abstract of title, that they refused to acquiesce in the sale.

They cannot now say that the plaintiff was not authorized to allow a reasonable time for the examination of the titles, because they must have known from his letter that the purchase money was not all paid, and that the purchaser wanted to have the titles examined. In addition, we have the testimony of Mr. Wilson (record, page 57) and of Samuel Q. Brown (record, page 41) as to the admissions of both the defendants.

The employment or authorization to Mr. Stitt was in parol, and it was for the jury to determine what these terms were, and in doing so, it would be perfectly proper to regard the acts and declarations of the parties, as showing the interpretation which they themselves put upon it.

TENTH AND ELEVENTH.

The two points embraced in the tenth and eleventh assignments of error, contained a re-statement of nearly all the points already argued.

The extent and limitation of plaintiff's authority was a question for the jury, and if it believed that within the time so limited and before any revocation of said authority, the plaintiff found a purchaser ready and willing to buy the land on defendants' terms, it was too late for them then to attempt to add new terms or conditions not coupled with the original authority, and they could not refuse to go on and complete the sale without liability to the plaintiff. He had already earned his commissions, and could not be deprived of them without any default on his part.

TWELFTH.

The Judge was clearly in error in that part of his charge embraced in the twelfth assignment of error. The plaintiff did claim that he was entitled to compensation for his services rendered under the contract of August, 1864. It is true, that the authority to sell given then, was originally limited to thirty days, but

we claimed, and the plaintiff testified, that the subsequent arrangement was merely a renewal and extension of the first one.

Speaking of this arrangement of August, the plaintiff testified that, when the thirty days had almost expired, he told Mr. Huidekoper, who said that it made no difference as to time, so he accomplished the sale (record, page 51), and on cross-examination he said, that the deposit of the deed was merely a continuation of the old arrangement (record, page 55).

It was partly for this purpose that the common counts were added. If we had not claimed anything under the so-called arrangement of August, the special count was sufficient, but because it covered only work done after November, we thought it necessary to add the common counts.

It is true that a broker working on a contingent compensation, is not entitled to anything unless he accomplishes his sale within the time limited, but if before the expiration of the time, his principal extends the time, or frees the contract from any limitation whatever, then the broker is entitled to compensation for his services whether rendered before or after this extension.

Whether or not the arrangement of September and November were renewals and extensions of the one of August, was a question for the jury. All these arrangements were in parol, and the Court had no right to take the question of fact from the jury, and instruct them as matter of law what the contract was. The jury should decide on the evidence, and what was proven by it.

It cannot be contended that because, whether we recovered under the new or old arrangement, the measure of damage would be the same, and that, therefore, we were not hurt by this portion of the charge. But as will be seen hereafter, we claimed that whether or not the defendant could revoke the authority to sell at any time before its execution, without liability to plaintiff for the full amount of his commission, they could not do so, unless he were in default, without compensating him for his services already rendered, and in that event, the period for which he could recover was a matter of great importance to him.

THIRTEENTH, FOURTEENTH AND SEVENTEENTH.

A power of attorney coupled with an interest in the execution of it, or made for a valuable consideration, is irrevocable.

Where a power of attorney is given as part of a security for money, it is not revocable. *Walsh vs. Whitcomb*, 3 Esp. 565.

A, being indebted to B, in order to discharge the debt, executed to B a power of attorney, authorizing him to sell certain lands belonging to him, A, and it was held that this being an authority with an interest, could not be revoked. *Gaussen vs. Morton*, 10 B. & C. 731.

The Court will not permit the revocation of a power of attorney, executed for a valuable consideration. *Bromley vs. Holland*, 7 Ves. Jr. 28.

In *Smyth vs. Craig*, 3 W. and S. 14, Ch. J. Gibson said: "It is settled, however, that a power coupled with an interest in the execution of it, is irrevocable," and in *Coffin vs. Landis*, 10 Wright, 426, Judge Strong himself admitted that a power of attorney executed for a valuable consideration was an exception to the general rule that powers of attorney are revocable at pleasure.

The authority to the plaintiff to sell, even if nothing had been said as to the time during which it was to continue, would be protected under either of the foregoing exceptions. In consideration of this authority, the plaintiff undertook to sell the land, and expended time and money in his endeavors. This was a valuable consideration for the contract, and rendered it inequitable and unjust for defendants to revoke it, without at least, reasonable notice of their intention to do so. He also had an interest in the execution of the contract, as his compensation for his services was to be fixed thereby.

This rule has been applied to cases between principals and factors, it being held that although the authority of a factor to sell may, as a general rule, be revoked at any time; yet when advances have been made on the credit of the goods, the authority cannot be revoked without first repaying such advances. *Smart vs. Saunders*, 54 E. C. L. R. 379.

The contract declared upon and testified to by the witnesses on the part of both plaintiffs and defendants, was not an agreement to sell to Wm. Stitt, but a contract of employment to sell land, and the de-

posit of the deed in escrow, first with Jay Cooke & Co., and afterwards with Drake Brothers, was merely done as a substitute for a power of attorney, and even if the defendants could withdraw the deed so as to prevent the passage of the title, they could not thereby rescind their contract with the plaintiff, even if it were indefinite in duration, without liability to him.

FIFTEENTH.

The evidence in relation to the date of the letter dated November 27th, but which Alfred Huidekoper testified was written November 22d, was not intended merely to impeach the honesty of the defendant.

If that letter was written and mailed November 27th, 1864, it would have been a manifest absurdity for the defendants to contend that the authority to sell was limited to December 1st, for if that were so, the plaintiff would have had only one day after his arrival in Philadelphia in which to sell the land.

This is the reason that we insisted on the date of the letter, and it should have been submitted to the jury in that light, and not merely as a gratuitous attempt to impeach the honesty of Mr. Huidekoper.

An inspection of the plaintiff's testimony will also show that although he does say that a letter was written the day of the date of the deed of the acknowledgment, and he does not fix that date. (Record, page 52.) It is also to be observed that the acknowledgment of the deed is dated November 21st, so that it does not corroborate the defendant.

SIXTEENTH.

It is true that, ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, but the rule is open to many exceptions, and does not apply to a case when the negative implies a positive allegation, or as it is stated in Starkie on Evidence, it "is inapplicable when a negative depends on the establishment of an opposite positive fact."

Now, in this case, the plaintiff swore positively that Huidekoper offered to reduce the agreement as to $2,500 to writing but did not

do so, because he (the plaintiff) said it was not necessary. If, therefore, any such presumption exists, it is in favor of the testimony of the plaintiff, who testifis that Mr. Huidekoper offered to reduce it to writing, but that he refused it, being testimony as to an additional positive fact.

It is not true, either in metaphysics or law, that "it is not possible to remember a thing that never existed." The every-day experience of the world shows the fallacy of such an assumption. Men will often be willing to swear that they had performed certain things, when the truth of the case is that they had only determined to do them, and the determination to do them made such an impression on their memory that they had forgotten that they did not carry out their intention. Such cases are not isolated, but of every-day occurrence.

Another exception to this rule of presumption in favor of positive as against negative testimony, is where the attention of both parties was particularly called to the matter in dispute. In such case, the real question must be as to the credit of the witnesses, and there is no presumption either way.

In this case the attention of both parties was particularly directed, at the time of the occurrence, to the subject matter in dispute. One says that he offered certain papers, which were accepted; and the other, that they were offered and refused. Here there can be no question of positive and negative testimony; each swears to a positive fact. If it be impossible for Mr. Huidekoper to remember that he offered, and Mr. Stitt accepted these papers, unless it were so, is it not equally impossible for Mr. Stitt to remember that he declined to take them, if he did not? Would not the one allegation be as much of a falsehood as the other?

And then, as to the time within which the sale was to be effected. We do not rest merely on Mr. Stitt's statement that the papers referred to by Alfred Huidekoper were not delivered, but we have also his positive statement that Alfred Huidekoper said he would not limit the time to any specified date, as it would be against the plaintiff's interest; but that he should have all the time he wanted, and at least until he notified them that he could not sell. Is not this as positive as Mr. Alfred Huidekoper's statement that he gave him a paper setting forth that the authority should expires December 1.

When, therefore, as in this case, the negative (if it can be called so) depends upon the establishment of an oppisite fact, there can be no presumption either way; but the question is one simply of credibility, and must be decided by the jury.

EIGHTEENTH AND NINETEENTH.

A general power to sell includes all that may be necessary to the execution or the power, and where usage or custom is such, and the authority contains nothing to the contrary, the broker may sell on credit.

That this is the rule in relation to personal property, cannot now be doubted; and in the case of *Laussatt vs. Lippincott*, Ch. J. Tilghman goes still further, and says, that "anything not inconsistent with a general power to sell, he may do." 6 S. & R., 392. The same rule has been adopted in New York, where it has been held that under an authority to sell oxen, an agent would be "justified, under the exercise of a sound discretion, in selling the cattle upon a reasonable credit." *Leland vs. Douglass*, 1 Wendell, 490. (See also *Delafield vs. Illinois*, 26 Wendell, 192.) And in Massachusetts, see *Etheridge vs. Bierney*, 9 Pick., 272, Judge Story, in his works on "Agency" and "Sales," advocates the same rule. (See Story on Sales, sec. 90, and Story on Agency, sec. 60.

There is no reason for restricting this rule to sales of personal property and not extending it to real estate. On sales of real estate the security for the balance of the purchase money is greater than in sales of personalty, for in the former, until the deed is delivered, the vender has a lien on the property for the price, and the ability of the vendee to pay is of little moment; whereas, in the latter, as soon as possession has been delivered, the lien is gone forever, and all must depend on the purchaser's credit.

Therefore, if the law allows a factor or agent, for the sale of personal property, in the exercise of a reasonable discretion, to sell on credit, where so much depends upon his judgment as to the responsibility of the purchaser, it should certainly sanction such a sale of real estate, where that is of little importance.

Whatever may be the rule in ordinary cases, when the custom or usage of trade sanctions a sale on credit, there can be no question as to the broker's power to make such a sale, if the power is silent on

that point. Parties are always presumed to make their contracts on the bases of the customs and usages of trade, and unless the terms of the contract expressly exclude it, such custom will be incorporated into and made part of the contract. Great stress was laid by the defendants on the case of *Ives vs. Davenport*, 3 Hill, 373, but in that case Judge Bronson admits that, when the usage of trade is so, a broker acting under a general authority to sell, may do so on credit.

What is the custom of the trade, is properly a question for the jury, and the learned judge in undertaking to decide it himself, and even going farther and instructing the jury as a question of law, as to what the terms of a parol contract were, was clearly in error. He might have instructed them without interfering with their duties, as to what evidence was necessary to prove a custom or what would constitute one, and that, in the absence of such custom, a sale on credit would not be authorized, unless the power expressly sanctioned it. But he did not do this; he instructed the jury, as a matter of law, that the plaintiff "could only make a cash sale."

In Chitty on Contracts, page 77, the rule is laid down, that "when the contract does not depend solely on written documents, the question as to what such contract was, is properly one for the jury." And even when the contract was reduced to writing, but the instrument is lost, its construction is for the jury. *Moore vs. Holland*, 39 Maine, 307. Whether, therefore, the contract between plaintiff and the defendants was wholly in parol, or had been reduced to writing and afterwards lost, its contents and construction was for the jury, and should not have been taken from them.

TWENTIETH.

1st. Under all the circumstances of the case, the plaintiff had a right to execute the contract with Backus & Morse in his own name. This was the very purpose for which the deed was deposited with Jay Cooke & Co. and Drake Brothers. He had no authority to execute a contract in the names of the defendants, for they had not given him any power of attorney; they had not constituted him their attorney to sign their names, and if he had undertaken to do so, he could not have bound them. The only

way in which he could bind Backus & Morse, was by contracting in his own name, and the defendants by their own contrivance had declared to the world that such a contract was authorized by them. But whether the contract was binding on them as between Backus & Morse, so that the latter could have enforced specific performance, or not, the plaintiff had performed his duty when he found a purchaser ready and willing to take the property on the defendants' terms.

2d. Although on the day the contract was made, January 10th, Backus & Morse were not bound to take the property, yet when on the 14th, they deposited the $10,000.00 and made their election, they were bound to take the whole and pay for it. After this there was no option, and the purchasers were absolutely bound for the full amount of the purchase money. There was no provision in the contract for its recession on the payment of a forfeiture after that date; indeed, there was no forfeiture at all to Mr. Stitt or anybody else.

It is true, that the contract until January 14th was merely a refusal, but after that day, when purchasers had made their election, it became an absolute, binding contract, not to be released except with the consent of both parties, and the defendants did not attempt to revoke their authority until ten days after this election was made.

When, therefore, the learned Judge charged that "Backus & Morse were not bound to take the property," that they were not liable for the whole purchase money, and that "Stitt himself had no power of enforcing the payment of the price named for the lands," he certainly misinterpreted the contract.

Under the Statute of Frauds it is not necessary that the memorandum should contain a specific agreement to pay the purchase money of real estate, it is sufficient if it contains a description of the land sold, the terms and the price to be paid. Specific performance has frequently been enforced on a memorandum in the form of a receipt, signed only by the vendor, and delivered to the vendee.

3d. Neither was this a sale on credit, even if the evidence, which we offered, was properly rejected; after the 14th of January, there was no option or contingency on the part of the purchasers They were absolutely bound for the purchase money, although prior to that time they could have withdrawn.

4th. The validity of the contract was not affected by the fact that the election of Backus & Morse was not in writing. When they gave notice of their intention to take the whole of the land, and deposited the $10,000.00, within tne time allowed, they were bound by the contract without regard to the fact that such notice was not in writing.

In *Sweitzer vs. Hummel*, 3 S. & R. 228, Ch. J. Tilghman held that when a purchaser had an election among several tracts of land, such election and notice of it need not be in writing, but might be by parol, and the opinion of Judge Williams in *Smith & Fleck's Appeal* reported in 19 P. F. Smith, 474, completely covers this point. In the latter case Smith & Fleck had agreed in writing to sell to S. Raydure & Son for $6,000.00 certain real estate, giving them the refusal for ten days. This memorandum was not signed by the vendees and did not contain an agreement on their part, either to take or pay for the land. Within the time allowed, one of them gave a verbal notice of their intention to take the land. The Court held that this notice was sufficient, that a written notice was not necessary, and that they were entitled to a conveyance. In the course of his opinion he says: "Can there be a doubt that if the defendants [the vendors] had tendered the plaintiff a deed within a reasonable time after notice of their election, they would have been bound to accept it, and pay the purchase money, in accordance with the agreement."

It is apparent, therefore, that the learned Judge was in error when he charged the jury that this contract could not have been enforced against Backus & Morse, and that the manner in which the notice of their election was served made any difference.

5th. We come then to the question which has been referred to before, but not fully discussed, viz., When does a broker earn his commissions?

In *Keys vs. Johnson*, 18 P. F. Smith, 42, Judge Sharswood says: "Brokers are persons whose business it is to bring buyers and sellers together. They need have nothing to do with the negotiation of the bargain. A broker becomes entitled to his commissions when he procures for his principal a party with whom he is satisfied, and who actually contracts for the purchase of the property at a price acceptable to the owner."

"A broker or agent who undertakes to sell property for another for a certain commission, if he finds a purchaser willing to purchase at the price, has earned and can recover his commission, though the sale never was completed." 43 Barb., 529.

In *Lorillard vs. Silver*, 35 Barb., 132, the Court held that the agent had earned his commissions when he procured an offer for the property on the terms fixed, and his principal was bound to account for them whether he sold the property or not.

See also *Cook vs Fisk*, 12 Gray, 491, and the cases cited before.

It is apparent, therefore, that the plaintiff was entitled to his commissions when he found a purchaser ready and willing to purchase at the price and on the terms fixed. It was not necessary that he should have made a binding contract, if it was the defendant's conduct which prevented one being made. We offered to prove that Backus & Morse were ready and willing to take the land and pay the price upon the production of a satisfactory title, and that their agreement with the plaintiff was to that effect. Whether or not this evidence would have been admissible in an action directly on the written contract, we have already discussed, but it is not necessary to consider it now. The purchaser was ready and willing to buy, and the evidence was clearly proper on that ground.

At this stage the learned Judge seems to have overlooked the construction of the contract between plaintiff and defendants, upon which our action was based, and which he at first said was for the jury. We claimed that this contract was not a conditional sale, but a contract of employment, and that the deed deposited in escrow was merely a contrivance, substituted for a power of attorney, as evidence of plaintiff's authority to contract.

Suppose the defendants could have withdrawn their deed, and thereby prevent the title from passing to the purchaser, they could not defeat the plaintiff's right to his commissions, if he had already found a purchaser ready to take the land, even if a binding contract had not been made.

It is too late now for the defendants to object to the ability of the purchasers; they made no objection to it at the time, and moreover, the testimony of the purchasers shows that they were able to take and pay for the land.

TWENTY-FIRST.

Even if the plaintiff exceeded his power in allowing time for the examination of the title, the conduct of the defendants was a ratification of his acts. He wrote to them that he had sold the land; had $10,000 in hand, and could not get the balance until he got an abstract of the title. He did not tell them the price at which he had sold, because they knew he could not sell for less than $40,000, and that was all they were interested in. They were entitled to that much, and no more, and it was of no importance to them for how much more he sold it. The letter necessarily implied that he had sold it for at least $40,000. It could not make any difference to them who the purchasers were, and if they intended to object on that account, they should have done so at once. But they did not do it then, nor have they done it since. Knowing that the plaintiff had allowed time for the examination of the titles, they sent an abstract, as requested, thereby ratifying that portion of the contract, and estopping themselves from denying plaintiff's authority to allow it. It is true that he "did not say it was no sale for cash, or that it was a refusal given to the purchasers without liability on their part to pay the whole purchase money," because such was not the fact. When he wrote the letter referred to, namely, January 14th, the sale was an absolute one and the purchasers were liable for the whole amount of the purchase money provided the titles were good, and defects in the title tendered may always be used as a defence to a suit for purchase money, whether the right is expressly reserved in the contract or not.

When F. W.. Huidekoper made the declaration to Samuel Q. Brown, that he supposed the sale was all right, he knew who the purchasers were, because Mr. Brown had just told him.

All this was evidence of ratification which should have been submitted to the jury for their consideration, and coupled with the fact, that it was not until ten days after the sale, and the plaintiff's letter notifying them of it, that they gave any intimation of their intention not to stand by the sale, would have warranted the jury in finding that they had ratified it.

TWENTY-SECOND, TWENVY-THIRD AND TWENTY-FOURTH.

1st. The plaintiff having testified that the defendants employed him to sell land for them at a fixed compensation, and agreed that he should have all the time he desired to make the sale, and that the contract should not be revoked until he notified them that he could not sell, and that in consideration thereof he undertook to sell the land, and spent nearly five months time and from $4,000 to $5,000 in his effort to sell the land, it was error in the Court to charge the jury, that the defendants could, at any time before a sale, withdraw from their contract without liability to the plaintiff.

Admitting for the sake of argument that if an *indefinite* employment, they could have withdrawn from their contract without liability, in this case the testimony was that they employed the plaintiff, and agreed to give him all the time he wanted until the sale was made.

Whether the Court believed this or not, it was error to withdraw it from the consideration of the jury: they are the judges of the credibility of the witnesses, and of the effect of the testimony. The contract of employment was not a written contract, the construction of which would have been for the Court, but the whole agreement was in parol, and what that agreement was, and what its effect, was a question for the jury.

This, according to the testimony of the plaintiff, was a contract of employment for a definite purpose, and was to continue until that purpose was accomplished. If, therefore, the defendants could discharge him from their service before a sale, without any fault on his part, they were bound at least, to compensate him for the services already rendered, and in an action on the contract, or in *indebitatus assumpsit*, or on a *quantum meruit*, the plaintiff would be entitled to recover damages for such unauthorized discharge, and the measure of damages would be the value of the services rendered, and what he would have earned had the defendants fulfilled their part of the agreement.

Is not this case similar to that of a factor to whom goods have been consigned for sale, and who has made advances on the faith of the consignment? Yet it has always been held, that until such advances have been repaid, the authority cannot be revoked. (*Smart vs. Sanders, supra.*) Here on the faith of this employment,

and of the agreement that it should be continued until a sale was effected, the plaintiff expended his time and money in the service of the defendants, and it is inequitable and unjust to permit them to discharge him, without cause and without notice, and then relieve them from all liability for such services.

If the contract of employment had, therefore, been an indefinite one, the defendants could not have discharged the plaintiff, without cause, without liability for his services. But when the employment is for a definite time or purpose, or until such time as certain work can be completed, or to do certain work, the employer cannot discharge his agent before the time has arrived, or the work is finished, without liability for the services rendered, and for damages for what the agent lost by reason of his discharge before the contract had expired.

The measure of damage against one who has employed another to do certain work at a price agreed upon, and who has countermanded his directions and forbidden the further execution of the work, is "a recompense for the labor done and materials used, and *such further damages as might be assessed for the breach of the contract.*" *Clark vs. Marsiglia*, 1 Denio, 317. In an English case, *Smith vs. Thompson*, 8 C. B., 44, the plaintiff had been employed for two years at a fixed compensation and in addition 50 per centum on the gross profits, but was discharged, as the jury found, without cause, and it was held that the true measure of damages was the two years salary and the share of the profits. See also *King vs. Steiren*, 8 *Wright*, 99.

If, therefore, the defendants could discharge the plaintiff from their employment, they were bound to indemnify him for the time and money he had expended in their service, if the contract was indefinite in its duration; and if it was a definite employment to perform certain work, they were bound, in addition, to compensate him for the loss which he suffered by not being allowed to finish the work.

These questions, therefore, should have been submitted to the jury for their determination, and not taken from them by a peremptory direction to find for the defendants, even upon the assumption that plaintiff had not fulfilled the contract, and that the defendants could discharge him. What was the character of plaintiff's employment, was it definite or indefinite in its duration? How much time

and money had the plaintiff expended under the contract, when he was discharged? What were his services worth? What did he lose by not being allowed to finish his work? These questions should have been submitted to the jury. But the learned Judge did not do this; he charged the jury, as a matter of law, that the contract, which was in parol and entirely out of his jurisdiction, was an indefinite one, and could be revoked at pleasure without liability to plaintiff.

This case differs from *Coffin vs. Landis*, 10 Wright, 426, in several important particulars. There the contract between the plaintiff and defendant was in writing, and it was clearly within the province of the Court to interpret it; it does not appear from the report of the case, whether or not Coffin had rendered any services to the defendant before he was discharged, nor whether he had been compensated for them; the question reserved, and on which judgment was entered, was whether the "plaintiff can recover for any service, or loss of service, *after such discharge*." It may well have been, then, that the plaintiff had been fully compensated for his services and advances, if any, made on the faith of the agreement, and that the questions involved in *Bromley vs. Holland*, and *Smart vs. Sanders*, did not arise. This is very different from the present case, where the plaintiff had not been compensated for his services rendered, and where such compensation constituted part of the damages claimed.

But that case differs principally from the present, in that there the employment was not until the land was sold, while here it was. This appears from the argument of the counsel, and the opinion of both the District Judge and of Justice Strong. It seems to have been conceded that if such had been the contract, a different rule would have been established. The Court in that case, in the interpretation of a written instrument, found, as a matter of law, that it was not the intention of the parties that the employment should continue until all the land was sold. This was within its province; but here we have a parol contract, the construction of which is never for the Court, and testimony that the employment was until the land should be sold, or the plaintiff should give notice

that he could not sell, and yet the Court undertook to construe this contract and charge the jury, as matter of law, that defendants could discharge the plaintiff from their employment at any time, before a sale had been made, without any liability to him whatever.

As the learned Judge said, in the commencement of his charge, this was not an action "to recover damages because the defendants did not deliver to plaintiff, or permit to be delivered to him, the deed first deposited with Jay Cooke & Co, and afterwards with Drake Bros., but it is an action to recover compensation for services which the plaintiff claimed to have rendered the defendants in selling for them a body of land, or *negotiating* a sale for them, when he was acting as their agent under a special agreement," and whether the defendants could, by such refusal to deliver the deed, prevent the transmission of the title, is of no importance here. The question is, could they, under their contract with plaintiff, discharge him from their employment without compensating him for his services already rendered, and without liability for the loss which he suffered by not being allowed to finish the work.

2. The Court had no right to charge the jury, as matter of law, that the contract of January 10th–14th, was not within the power of plaintiff, for until the jury should find what the plaintiff's powers were, it was impossible for the Court to say what he could do, and what he could not.

The question might have been submitted to the jury in the alternative, instructing them that if they found the plaintiff was not authorized to sell for cash, that then the contract was not an execution of his power. Although we contend that the contract of January 10th was not a sale on credit, still the interpretation of that contract, after the exclusion of our offers of evidence, was for the Court, and the Judge would have the right to charge the jury conclusively as to its legal operation.*

But this was not done, and for this one error alone, even if there were no others, the judgment ought to be reversed.

3. But whether or not the contract of January 10th was within the plaintiff's authority, he had done all that was incumbent upon him, when he found a purchaser ready and willing to buy on the

*However, we entitled, that the contract of January 10, 1865 having been instituted as evidence of a collateral fact, the interpretation of it was for the jury also.

terms and at the price fixed by the defendants; and if they broke off the negotiations and refused to complete the contract, they are still liable for his commissions.

JAMES K. KERR,
EDWARD. S. GOLDEN,
GEORGE W. GUTHRIE,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

No. 47.—October Term, 1873.

WILLIAM STITT, Plaintiff in Error,

vs.

ALFRED HUIDEKOPER and FREDERICK W. HUIDEKOPER,

Defendants in Error.

STATEMENT OF THE CASE.

W. D. DAVIDGE,

For Defendants in Error.

McGill & Witherow, Printers, 1107 E street, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1873.

WILLIAM STITT, Plaintiff in Error,

vs.

ALFRED HUIDEKOPER and FREDERICK W. HUIDEKOPER, Defendants in Error.

No. 47.

STATEMENT OF THE CASE.

In August, 1864, the plaintiff in error and plaintiff below was by parol authorized by the defendants to procure, within a limited time, a purchaser for certain oil lands in Venango county, Pennsylvania, at the price of $30 per acre, and in case of success, was to receive for his services $2,500. Subsequently, and upon his admitted failure to accomplish the object, although the time was extended, a new arrangement, also in parol, was, about the 22d of November, entered into.

The price of the lands, 1,288 acres, was fixed at $40,000; the sale was to be for cash; the plaintiff was to be at liberty to take the land himself or obtain a purchaser, and on payment of the price fixed the deed of the defendants was to be delivered to the plaintiff, and the defendants were to pay him $2,500 out of the $40,000. The evidence as to whether the authority of the plaintiff was limited as to time was contradictory, but he offered evidence tending to show that there was no limitation in that regard. In execution of the arrangement, the defendants executed a deed in fee for the lands to the plaintiff, under date of November 19, 1864, and in consideration of $40,000, (R., f. 238,) and transmitted the same to Jay Cooke & Co. as an escrow,

and with directions to deliver it to the plaintiff on his depositing to the credit of the defendants $40,000. (R., f. 221.)

The deed was afterwards, to facilitate negotiations, transferred to Drake Brothers, of New York, to be held under similar directions, that is, as an escrow, and to be delivered on payment of the $40,000. (R., f. 245.) On the 10th of January, 1865, the plaintiff entered into a contract with Backus & Morse, which will be found R., f. 234. By it the plaintiff agreed to sell the lands, *or certain specified portions*, at $55 per acre, to Backus & Morse, but the latter did not agree to buy, but to decide on or before the 14th of January, 1865, whether they would buy the lands, or, if any, *how much*. They agreed, if they decided to buy, to deposit with Drake Brothers, on or before that day, $10,000, which was to be paid to the plaintiff as soon as the titles were examined and found perfect, and the deed of the plaintiff was to be deposited with Drake Brothers, to be held until the balance of the purchase money was paid or *satisfactorily secured*. The time of payment of the balance was not *to exceed sixty days* from the payment over to the plaintiff of the $10,000.

On the 14th of January, 1865, Backus & Morse elected, *by parol*, to take the whole one thousand two hundred and eighty-eight acres, and made the deposit with Drake Brothers of $10,000, but their election was not according to the contract, but on condition that "*if the balance of the purchase money is not deposited by the time specified in the contract, the* $10,000 *is to be forfeited to Mr. Stitt;*" and their election in this form was indorsed by Drake Brothers upon the contract. (R., f. 232.) In other words, Backus & Morse secured the refusal of the property for sixty days without *becoming bound for the purchase money.*

On the 24th of January, 1865, the defendants revoked the authority of the plaintiff, and on the 27th of the same month the plaintiff tendered the money ($40,000) to Drake Brothers and demanded the deed, which they refused to deliver.

The lands mainly belonged to the defendants as execu-

tors, and their value was enhanced by the discovery of an oil well.

The suit was brought to recover $2,500, and also the difference between the $40,000 and $70,840, or $30,840, the plaintiff claiming that he executed the power vested in him according to its terms.

The plaintiff claimed that there was evidence of ratification of the contract with Backus & Morse.

At the trial, thirty-six exceptions were taken, but only twenty-four are assigned for error.

Of these, four relate to the exclusion of evidence, and the rest to the charge of the court.

Points.

I. This writ of error should be dismissed for the want of jurisdiction. The transcript does not show any judgment. The verdict was rendered on the 16th of May, 1871, and on the following day the writ of error filed, was returnable to December term, 1871. (R., fs. 280–284.)

The transcript was filed in this court on the 6th of December, 1871. This is the third term. (Rule 14.)

There must be a final judgment to give jurisdiction.

II. The first exception (R., fs. 287, 288, Assignment No. 1) is, that the court erred in rejecting the copy of a paper after notice to the the defendants to produce it and its production in court. The defendants were in court, ready to be examined, to prove that the paper produced was the original, but the plaintiff declined to examine them, and insisted on the introduction of the copy on the ground of his denial that the paper produced was the original.

(The defendants as well as the plaintiff were examined by the court. R., fs. 196, 197.)

It was for the court to determine whether a proper foundation was laid for the introduction of secondary evidence.

III. There was no error in refusing to admit parol evidence to show that the sixty days in the contract with

Backus & Morse were given to allow the titles to be examined, and that such allowance was reasonable, (R., fs. 289, 290, Assignment Nos. 2 and 3;) or that the provision of the contract for sixty days' credit was inserted in the contract through mutual mistake. (R., fs. 291, Assignment No. 4.)

The parol evidence sought to be introduced plainly contradicted the terms of the written contract, and the contract was not a paper collateral to the issues, but lay at the very foundation of the plaintiff's right to recover.

IV. The court charged that the contract made by the plaintiff with Backus & Morse was not in conformity with the authority of the former, and hence that the defendants were entitled to withdraw the offer and revoke the agency.

This ruling is in one shape or other the subject of the exceptions at folios 298, 299, 301, 302, 304, 305, 308, 309, 314, 316, 317, 318, 321, 322, and 323 of the record and of the assignments of error numbered 5, 6, 7, 8, 10, 11, 13, 14, 17, 18, 19, 20, 22, 23, and 24.

1. The transaction was an offer to sell to the plaintiff, or such purchaser as he might obtain, on the terms of the offer. It was founded on no consideration, and imposed no obligation on the plaintiff or any one else. Indeed the portion of the charge defining the nature of the arrangement is not excepted to. (R., f. 270.)

But it is denied that, unless there was an agreement to the contrary, the defendants had a right to withdraw their offer at any time before acceptance.

There can, however, be no doubt that, according to the rule of the common law, an offer not founded on a consideration or a sealed instrument may be revoked before acceptance.

Boston and Maine R. R. *v.* Bartlett, 3 Cush., 224.
Willard *v.* Tayloe, 8 Wall., 557, 564, and cases cited.
Bean *v.* Burbank, 4 Shep., 458.
Cook *v.* Oxley, 3 T. R. 653.

Burnett *v.* Bisco, 4 Johns., 235.
Tucker *v.* Woods, 12 Johns., 190.
1 Parsons on Contr., 5th ed. 483.

Besides, the plaintiff was agent of the defendants, and it is settled that where no limitation of the agency as to time is expressed, the principal may at any time put an end to the relation between him and his agent by withdrawing the authority, unless it is coupled with an interest, or given for a valuable consideration.

Story on Agency, §§ 463, 464, 465, 468, 474, 476, 477.
Hunt *v.* Rousmanier, 8 Wheat., 174.
And see particularly Coffin *v.* Landis, 10 Wright, (46 Penn. St. Rep.) 426; and Peacock *v.* Cummings, *id.*, p. 434.
Tower & Ward *v.* O'Neil, 66 Penn. St. Rep., 332.
Brown *v.* Pfor, 38 Cal., 550.
Simpson *v.* Lamb, 17 C. B., 603.

The above authorities clearly establish, that in the absence of an express stipulation, founded on sufficient consideration, a power or authority is, in its very nature, revocable. In the present case no such stipulation is pretended to exist. But it is urged that the arrangement between the plaintiff and defendants vested the former with an interest, and hence is within an admitted exception to the rule.

answer The ~~reason~~ is plain: The plaintiff never had any interest in the land, but only in his compensation for selling. In Hunt *v.* Rousmanier, this court defined what was meant by a power coupled with an interest, and declared that it must be such interest in the *thing itself* on which the power is to be exercised, and not an interest in that which is produced by the exercise of the power. (8 Wheat., 201.) In Blackstone *v.* Battermere, 53 Penn. St. Rep., 266, this question came before the Supreme Court of Pennsylvania, and it was held, that it is only when the power of attorney is coupled with an interest in the thing itself or the estate

which is its subject that it is irrevocable, and that an interest in the proceeds to arise as compensation for executing the power will not make it irrevocable. And the same point is decided in Hartley and Minor's Appeal, 53 Penn. St. Rep. 212, and indeed was necessarily involved in Coffin *v.* Landis, Peacock *v.* Cummings, Tower & Ward *v.* O'Neil, and Brown *v.* Pfor, above cited.

2. By the contract made by the plaintiff with Morse & Backus, the authority had not been so executed as to deprive defendants of the right to revoke.

The authority here was *special.* It was to take up the ~~bond~~ by paying the money. Nothing less than the payment of the money was an execution of the authority. It was not an authority to enter into any executory contract whatever.

The arrangement was *ex industria*, so shaped as to preclude any other execution of the authority than the payment of the money. The plaintiff was not employed to bring parties for negotiation to the defendants, but to obtain and deposit the money; and until that was done the authority was *in fieri.*

For the insufficiencies of the contract to destroy the right to revoke, the court is respectfully referred to the charge. (R., fs. 275, 276.)

A power of attorney to sell for a specified sum does not authorize a sale for "approved notes," but only for *ready money.* (Ives *v.* Davenport, 3 Hill, 373.)

As to such a contract not being according to the authority, see Story on Agency, fs. 147–154, 160–165; Higet *v.* Bollard, 4 Russ., 298; 1 Johns. Ch. Rep., 273, 282; Sugden on Vendors, 251, 252.

V. A ratification of the unauthorized acts of an agent must, in order to bind the principal, be with a full knowledge of all the material facts. (Owings *v.* Hull, 9 Pet., 607; R., fs. 303, 320, Assignment Nos. 9 and 21.)

Taking the conceded facts there was no evidence from which a jury could infer an ~~interest~~ to ratify. And see

the whole charge relating to ratification. (R., fs. 276, 277.)

VI. The only other exceptions (R., fs. 307, 310, and 312, Assignment Nos. 12, 15, and 16) require no comment.

W. D. DAVIDGE,
For Defendants in Error.